INDEX.

CASES CITED.

SUPREME COURT OF THE UNITED STATES.

CLARENCE S. HOUGHTON as Receiver in Bankruptcy of the assets and effects of Abram L. Canfield, bankrupt,
Appellant,

against

WILLIAM H. BURDEN,
Appellee.

October Term 1912.
No. 591.

BRIEF FOR APPELLANT.

Statement.

This is an appeal by the Receiver, now the trustee in bankruptcy of Abram L. Canfield, a bankrupt from a mandate of the Circuit Court of Appeals for the Second Circuit which reversed the order and mandate of the United States District Court, for the Southern District of New York, confirming the report of the Special Master, to whom the matter had been referred to hear and report his conclusions thereon.

The facts in this matter are as follows:

Canfield was engaged in business in the City of New York. Some time in December, 1910, one Kohler, acting as broker or go-between arranged between Canfield and Burden, the appellee herein, for a loan by the appellee to said Canfield of $10,000, for the use of which it was agreed between

the appellee and Canfield, that $1,800 was to be paid as interest, that is to say, six per cent. per annum for the use of the money, and one per cent. per month as long as Canfield used the money (fols. 356, 258, pp. 87 and 119).

Shortly thereafter a contract was prepared by Burden's attorneys purporting to cover the transaction (fols. 55-63, pp. 19-21), by the terms of which Canfield was to receive sums of money from Burden and Canfield agreeing to pay six per cent. per annum and one per cent. per month; as security for the repayment of the sum so loaned to Canfield, Canfield assigned certain book accounts to Burden aggregating about $14,000.

The agreement provided that the one per cent. per month charged in addition to the six per cent. per annum by Burden was to be for services rendered by Burden.

Thereafter, and subsequent to the making of the said loan and assignment of accounts, as aforesaid, Canfield was petitioned into bankruptcy. The then Receiver, and now Trustee appellant herein, contested the right of Burden, the appellee, to collect the accounts or to repayment of the money on the ground that the transaction between the bankrupt and Burden, appellee, was usurious and void, and that the agreement was merely a subterfuge and drawn in the form in which it appears in the record, for the purpose of evading the Usury Law of the State of New York.

On January 26, 1911, the appellee made and filed with the United States District Court, for the Southern District of New York his petition, in which he alleged that he was the owner of certain outstanding accounts which he alleged had been theretofore assigned to him by Canfield, and

was the owner of various sums of money which had been collected out of such moneys by the Receiver, and prayed the Court for an order directing the Receiver to pay over to him such moneys so collected.

The Receiver opposed the granting of such an order upon the ground that the written contract was merely a subterfuge and cover; that the real contract between the parties, to wit, the appellee and the bankrupt was usurious and void and that the appellee exacted for the loan of $10,000, interest at the rate of eighteen per cent. (18%) per annum.

This contract was made in the City of New York, State of New York, and was, pursuant to the contention of the Receiver, the appellant herein, void under the "General Business Law" upon the ground of usury.

The "General Business Law" of the State of New York, Sections 370 and 373, read as follows:

> "Sect. 370.—*Rate of Interest.* The rate of interest upon a loan or forbearance of any money * * * shall be $6 upon $100, for one year and at that rate for a greater or less sum, or for a longer or shorter time."

> "Sect. 373.—*Usury Contracts Void.* All * * * contracts whatsoever * * * whereupon or whereby there shall be reserved or taken or secured or agreed to be reserved or taken any greater sum or greater value for the loan or forbearance of any money, goods or other things in action, than as above prescribed, shall be void."

Upon the hearing on the petition, the matter was by consent of the parties referred to Hon. William H. Willis, as Special Master, to hear and

report the evidence and his findings thereon, who after a full hearing made his report and findings to the effect that the transaction between the Appellee and the bankrupt was usurious and that under the laws of the State of New York, wherein said loan and agreement were made, the appellee forfeited the principal (fols. 43-129; pp. 15-43).

At the hearing before the Special Master, the bankrupt and his bookkeeper testified positively with respect to the real transaction between Canfield and the appellee and that the written contract was made as a cover to avoid the Usury Laws of the State of New York (fols. 252-262, 267-268, 280-284; pp. 84-87, 89, 90, 94, 95). As against this testimony, the appellee denied the testimony of the bankrupt and his bookkeeper. The broker, Kohler, attempted to deny the testimony offered on behalf of the appellant, but in many instances corroborated the testimony offered on behalf of the appellant (fols. 355-357; p. 119).

The report and findings of the Special Master were thereafter on motion duly confirmed by Hon. Learned Hand, one of the Judges of the United States District Court, for the Southern District of New York (fols. 433-453, 454-456; pp. 145-154).

From the order of the United States District Court, the appellee herein appealed to the Circuit Court of Appeals for the Second Circuit on Assignment of Errors contained in the record.

The learned Circuit Court sustained the Special Master and District Court on the law but reversed the order of the District Court on the facts (pp. 167-169).

From the order of the Circuit Court, the Receiver, upon Assignment of Errors duly filed an appeal to this Court. In all, there are twenty assignment of errors (pp. 170-173).

Assignment of Errors.

The appellant relies upon the following as errors committed by the Circuit Court of Appeals for the Second Circuit.

First. That William H. Willis, the Special Master, to whom these proceedings on petition therefor of William H. Burden, claimant, had been referred to hear and take proof, having found as a fact and so reported to the United States District Court for the Southern District of New York, that William H. Burden, aforenamed, was not employed in any *bona fide* way to render services to Abram L. Canfield, bankrupt, and that the arrangement as contained in the agreement so made by and between the said Burden and said bankrupt, by which said Burden was to receive one per cent. per month on his advances "as compensation for labor and services to be performed and time to be expended by him in making the examinations, required by the terms of the bond executed by the Fidelity & Casualty Co., of New York" was not made in good faith or with the intention that such percentage should be paid for such purpose, but that such arrangement was intended to be and in fact was devised, to cover a scheme that said Burden shall receive more than the legal rate of interest on his advances to the bankrupt, and said finding of fact having been affirmed by the United States District Court for the Southern District of New York, the United States Circuit Court of Appeals for the Second Circuit was thereby precluded from reversing the final order thereon entered, unless such finding of fact was clearly against the weight of evidence, or clearly erroneous.

Second. That William H. Willis, the Special Master to whom this matter had been referred on petition therefor made by William H. Burden, having found as a fact that the agreement forming the basis of the said Burden claim was usurious and wholly void, and having so reported to the United States District Court for the Southern District of New York, and thereon such finding of fact having been affirmed by said United States District Court, the United States Circuit Court of Appeals, for the Second Circuit, erred in not determining that such finding as so affirmed became final and conclusive, unless such finding was clearly against the weight of evidence, or clearly erroneous.

Fourth. That William H. Willis, the Special Master to whom the matters herein had been referred, as such, on the petition therefor of William H. Burden, having made his findings of fact thereon, and thereon made his report to the United States District Court, for the Southern District of New York, and such findings of fact and report having been affirmed by the United State District Court for the Southern District of New York, the United States Circuit Court of Appeals, for the Second Circuit, erred in not determining that such findings became forever conclusive on the parties unless such findings of fact were clearly against the weight of evidence, or clearly erroneous.

Tenth. That the United States Circuit Court of Appeals for the Second Circuit, erred in determining that the Trustee herein had not proved his contention that the agreement made between Burden and the bankrupt was a cover for usury.

Eleventh. That the United States Circuit Court

of Appeals for the Second Circuit erred in determining that the preponderance of evidence in this proceeding was not in favor of sustaining the findings of fact made by William H. Willis, the Special Master herein, as affirmed by the United States District Court for the Southern District of New York.

Thirteenth. That William H. Willis, the Special Master to whom the matters herein had been referred, upon the petition therefor of William H. Burden, having found that the transactions therein were void, for usury, and such finding of fact having been affirmed by a Judge of the United States District Court, for the Southern District of New York, and a final order thereon having been entered on the 8th of July, 1911, the United States Circuit Court of Appeals for the Second Circuit had no jurisdiction to reverse said final order on the facts, unless such findings of fact or final order thereon, was clearly erroneous, or clearly against the weight of evidence.

Fifteenth. That the United States Circuit Court of Appeals for the Second Circuit erred in reversing the final order entered herein in the United States District Court for the Southern District of New York on the 8th of July, 1911, and resettled and re-entered on the 13th of July, 1911.

Sixteenth. That the United States Circuit Court of Appeals for the Second Circuit having found that the Court below had not committed any errors of law, said Court of Appeals erred in not affirming the final order entered herein in the United States District Court for the Southern District of New York on the 8th of July, 1911.

ARGUMENT.

I.

The United States Circuit Court of Appeals for the Second Circuit having found that the Court below had not committed any errors of law, said Court of Appeals erred in not affirming the final order entered herein in the United States District Court for the Southern District of New York.

In determining the questions involved on this appeal, the learned Circuit Court of Appeals did not find any errors of law to have been committed in the Court below but reversed the judgment for the reason that a majority of that learned Court was not persuaded that this appellant had proved his contention (Opinion of the Court, p. 167).

The first error of the learned Court below which we beg to present to this Court, is, that under the provisions of Section 566 of the Revised Statutes as interpreted and defined by this Court, the facts found by the Special Master and confirmed by the District Judge were conclusive on the learned Circuit Court of Appeals.

Section 566 of the Revised Statutes provides as follows:

> "The trial of issues of fact in the District Court in all cases, except cases in equity and cases in admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy, shall be by jury."

In construing this statute this Court has laid down the rule that the trial by a District Judge without a jury of any causes not excepted by the foregoing statute is in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the Court's determination of the issues of fact and of the questions of law supposed to arise upon its special finding, was not a judicial determination, and therefore not subject to re-examination in an Appellate Court.

> Campbell *v.* United States, 224 U. S., 99.
> Rogers *v.* United States, 141 U. S., 548.
> Campbell *v.* Boyreau, 21 How., 223.

Campbell *v.* U. S., 224 U. S., 99. This was an action at law against the sureties on the official bond of a Receiver of public moneys to recover for a default of their principal. The action was begun in the District Court and was tried by the Court without a jury. A judgment was entered for the defendants.

The plaintiff took the case on writ of error to the Circuit Court of Appeals, which held that the facts found were insufficient to support the judgment and reversed the latter with a direction to enter a judgment for the plaintiff upon the finding. The defendant then sued out a writ of error to this Court.

Mr. Justice VanDevanter, delivering the opinion of the Court, at page 195:

> "At the outset we are confronted with the question of the power of the Circuit Court of Appeals to consider the sufficiency of the facts found to support the judgment."
>
> "Section 566, Revised Statutes, provides that the trial of issues of fact in the District Courts in all cases except in equity and cases

> of admiralty and maritime jurisdiction and except as otherwise provided in proceedings in bankruptcy should be by jury. This was not one of the excepted cases. * * * In this state of the Statute Law, the trial in the District Court, without a jury was in the nature of a submission to an arbitrator, a mode of trial not contemplated by law, and the Court's determination of the issue of fact and of the questions of law supposed to arise upon its special finding was not a judicial determination, and therefore not subject to re-examination in an Appellate Court. (Campbell *v.* Boyreau, 21 How., 223; Rogers *v.* United States, 141 U. S., 548.) It follows that the Circuit Court of Appeals was without power to consider the sufficiency of the facts found to support the judgment."

The case at bar clearly comes within this ruling unless first, the matter involved constitutes an action in equity and not in law, or second, if specifically excepted by the provisions of the Bankruptcy Act.

The appellee instituted this controversy by a petition to the District Court in which he alleged that he was the owner of certain accounts receivable of the face value of $14,291.14. That this appellant, then Receiver, now trustee in bankruptcy had collected on such accounts from the persons owing same sums aggregating over one thousand dollars, all of which was his property; his prayer for relief is an order directing the Receiver to pay over to him all of such moneys so collected (fols. 1 to 23, pp. 1 to 8).

Manifestly, if the appellant had commenced an action on the facts recited in his petition as he had a right to do, his only remedy would be an action at law for trover or conversion. Under no

circumstances appearing in this record did his cause of action lie in equity; had the appellee attempted to frame his complaint in equity, he would have been defeated under the laws of the State of New York by the plea that he had an adequate remedy at law.

Bradley *v.* Aldrich, 40 N. Y., 510.

It being demonstrated that the remedy of the appellee lay in the law part of the Court the next question is, is it one of the causes excepted in "proceedings in bankruptcy."

This Court has already decided that a matter of the kind at bar is not a proceeding in bankruptcy, hence the exception made by provisions, Section 566 of the Revised Statutes, do not apply to this case.

Courts of Bankruptcy it has been held are given jurisdiction to try matters in controversy.

The mode of trial of such matters is specifically regulated by the Bankruptcy Act.

Section 19, Subdivision C of the Bankruptcy Act provides as follows:

> "C. The right to submit matters in controversy or alleged offense under this act to a jury should be determined and enjoyed, except as provided by this Act, according to the United States law now in force, or such as may be hereafter enacted in relation to trials by jury."

This provision of the act clearly relates to the provisions of the Revised Statutes regulating trials by a jury.

Speaking of this Act the Circuit Court of Appeals, Second Circuit, says:

> "In the present act (Sec. 19, Clause C),

where the matters in controversy are of legal as distinguished from equitable cognizance, the right of the parties to a trial by jury is expressly preserved."

In re Baudoine, 101 Fed. Rep., 574.
In re Russell, 101 Fed. Rep., 248.

In the matter at bar the appellant had the option of commencing suit either in a United States or State Courts to recover the moneys collected by the Receiver. He elected to proceed by intervening in the bankruptcy proceedings, thus creating a controversy in a bankruptcy proceeding which has been defined as those independent or plenary suits which concern the bankrupt's estate.

Knapp *v.* Milwaukee Trust Co., 206 U. S., 553.
In re Mueller, 135 Fed. Rep., 711.
In re Farrell, 176 Fed. Rep., 505.

But the suit or matter in controversy retains its character of legal or equitable cognizance according to the nature of the controversy involved and as the case at bar rests in law it was triable in the District Court by a jury and not having been so tried it was in the nature of a submission to an arbitrator and not the mode of trial contemplated by law.

Campbell *v.* United States (*supra*).

II.

The Special Master having found certain facts which were confirmed by the United States District Court, the Circuit Court of Appeals should not have reversed the judgment and order entered thereon unless the findings of fact were clearly erroneous or clearly against the weight of evidence.

When a tribunal finds a certain state of facts not at first hand, but on the report of a Master appointed merely to take evidence, the Appellate Court has equal, in fact greater facility to spell out the truth in the case from a perusal of the testimony, for the reason that its consideration thereof is aided and illumined by the argument on the evidence of the Court below; but the manifest advantages possessed by a tribunal that hears and sees the witnesses that testify to a conflicting state of facts to glean and determine the truth in the litigation, has been so well recognized by this Court as to lead it to lay down the rule that while the finding of a Master to hear and report the evidence is not absolutely conclusive if there be no testimony to support it, but so far as it depends upon conflicting testimony or upon the credibility of a witness, or so far as there is any testimony consistent with the findings, it must be treated as conclusive.

Davis *v.* Schwartz, 155 U. S., 631.
Kimberly *v.* Arms, 129 U. S., 512.

Davis *v.* Schwartz (*supra*):

This was a matter that was sent to a Special Master to hear and report the testimony. In discussing the consideration to be given the report and findings of fact by the Special Master, Mr. Justice Brown, writing for the Court at page 636, says:

> "As the case was referred by the Court to a Master to report, not the evidence merely, but the facts of the case and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact is attended by a presumption of correctness similar to the case of a finding by a Referee, the special verdict of a jury, the findings of a Circuit Court, in a case tried by the Court under Revised Statutes, Sec. 649, or in an admiralty case appealed to this Court. In neither of these cases is the finding absolutely conclusive as if there be no testimony to support it, but so far as it depends upon conflicting testimony or upon the credibility of a witness or so far as there is any testimony consistent with the finding it must be treated as unassailable."

See also opinion of Mr. Justice Lurton in Ohio Valley Bank *v.* Mack, 163 Fed. Rep., 155.

We respectfully submit that the rule above enunciated applies with peculiar force to the matter at bar.

The facts in dispute between the parties were, by consent of all concerned, referred by the District Court to a Special Master to hear and take the testimony and report his opinion thereon, and on the law, to the District Court.

The Special Master heard all the testimony, saw and heard all the witnesses and his report

to the District Court evidences a most careful and exhaustive discussion thereof (fols. 43 to 129, Pr. Rec., pp. 15 to 43); he had full scope and opportunity to gauge the credibility to be given the various witnesses, his integrity or impartiality is not impugned, the testimony is conflicting and every finding of fact is supported by and consistent with the evidence before him and his findings should not have been disturbed.

The findings of the Special Master were carefully reviewed and confirmed by the learned District Judge in an opinion contained in this record (fols. 433-453, pp. 145-151).

III.

The prepondorance of evidence was in favor of sustaining the findings of the Master.

The learned Circuit Court of Appeals has overruled the findings of fact made by the Master and confirmed by the learned District Judge, preferring to lend credence to the evidence of Burden and Kohler to that of Canfield and Hess.

Under the statute of the State of New York, the taking or agreeing to take interest on the loan of money at a rate greater than six per cent. per annum makes the transaction usurious and illegal and void; numerous schemes are resorted to to hide and conceal or give a seeming legality to a transaction which in reality is usurious.

In the cause at bar the transaction took the guise of an apparently open and legal transaction; under the written agreement between Canfield and Burden (fols. 55-64, pp. 19-22); the latter was to

lend the former $10,000 on the security of outstanding accounts on which he was to receive six per cent. per annum; Burden was also to do some work for which he was to be compensated at the rate of one per cent. per month on the amount loaned.

That Burden agreed to and did obtain more than six per cent. per annum is thus beyond doubt.

The only question open is, did he obtain such greater sum as interest or as compensation for services rendered? If the latter the transaction is valid, if the former it is void.

Burden denies that there was any usury contemplated in the transaction; in this the broker Kohler attempts to corroborate his principal, Burden. Canfield and his Secretary, Mrs. Hess, testify distinctly and unequivocally, that the transaction was usurious, that the arrangement was that Burden was to get six per cent. per annum and one per cent. per month on the amount advanced; that the written agreement was but a cloak to hide the transaction (fols. 252 to 262, pp. 85 to 86; fols. 267-268, pp. 89-90; fols. 280-284, pp. 94-95.

Passing the question of the interest of any of these witnesses in the outcome of the litigation, we respectfully submit that there is a feature in the case, a consideration of which will show what was the real transaction and that is, was Canfield in search of an additional employee in his business or was he seeking the use of money? Was Burden seeking a means of making money through employment or was he seeking to make money on an investment of money?

That Canfield was seeking for an employee is not pretended; that he was seeking for money is

conceded and established beyond doubt; Burden says that he was seeking for employment, light employment and that the loan of money by him was but an incident to his main purpose; if that be so why was his labor restricted only to the collateral he was getting on the loans? Why were there no discussions between the parties for work generally in Canfield's business? Why was the amount to be paid to Burden fixed at one per cent. per month on the amount to be loaned by him?

There are undoubtedly cases where men honestly seek employment and are willing, to attain their end, to lend money to their employers; but in all such cases the employment is the main end, the employment is general in the business of the employer; only when some ulterior purpose is sought to be accomplished, under an honest appearance, is an agreement of the kind at bar resorted to; under the theory of the appellee a note shaver has but to lend a bulk sum to one person on a hundred or more promissory notes to legalize a charge of six per cent. per annum and one per cent. per month on the amount loaned (fols. 376-377, p. 126).

The language of Mr. Justice Allen of the New York Court of Appeals may well be applied to the case at bar.

> "The sole question is, whether the transaction was a *bona fide* sale of the bonds at an exorbitant rate, or a loan of money under guise and color of sale of choses in action by which the lender reserved or secured to himself a greater rate of interest than that allowed by law. The transaction must be judged by its real character rather than by the form and color which the parties have seen fit to give it.

> The shifts and devices of usurers to evade the statutes against usury have taken every shape and form that the wit of man could devise but none have been allowed to prevail. The Courts have been astute in getting at the true intent of the parties and giving effect to the statutes."
>
> Quackenbos *v.* Sayers, 62 N. Y., 345.

That the real motive moving the parties was the giving and taking of an usurious rate of interest and not of an employment is abundantly evidenced by the testimony of Kohler.

This witness on cross examination testified as follows:

> "Q. But there was some conversation between Mr. Burden and yourself and Mr. Canfield in relation to the extra 1%?
>
> A. I told Mr. Canfield that it would cost him that much money.
>
> Q. And were you the first party that told Mr. Canfield that?
>
> A. I was.
>
> Q. Now, what led up to the discussion of the 1% with Mr. Canfield?
>
> A. Why, naturally Mr. Canfield wanted to know what it was going to cost him; he paid more money on previous loans.
>
> Q. Never mind about previous loans. About this loan, what led up to your telling Mr. Canfield he would have to pay the extra 1%?
>
> A. What led up to the facts? I told him the conditions on which the arrangement could be made with Burden.
>
> Q. What were those?
>
> A. That it would cost him on $10,000, $1,800 a year.
>
> Q. Did you explain how it would cost him that?
>
> A. No, I told him that is what it would cost him.

Q. Without explaining the details?

A. No.

Q. Now, who told you, or what led you to make that statement to Mr. Canfield?

A. Because Mr. Canfield wanted to know what it was going to cost him always when I made a loan for him.

Q. Did you make that statement on your own initiative or because of your talk with Mr. Burden?

A. Certainly, Mr. Burden told me what it was going to cost before I told Mr. Canfield, otherwise I would not have known it" (fols. 355-357, p. 119).

It must be apparent from this testimony that the questions discussed between Canfield, Burden and Kohler were not the employment of Burden or compensation for such employment but the loan of $10,000 and the cost of such loan per annum to Canfield.

We will not discuss the evidence further though there are many other features therein referred to and discussed by the Master, amongst others the explanation by Burden that the reason that the compensation for labor was fixed at one per cent. per month on the amount advanced was "because the work to be performed depended almost entirely on the number of accounts and the amount of them" (fol. 376, p. 126), which stamp this transaction as utterly illegal and void.

IV.

No errors of law having been committed in the Trial Court its order and mandate should be confirmed.

We believe that all the assignments of error have been discussed under the preceding points and we will end our brief by a short discussion of the law of usury in the State of New York.

Parol testimony can be introduced for the purpose of showing the real transaction between the parties and showing that the agreement, as drawn, was a mere subterfuge and made with the purpose and intent of evading the usury laws.

By a weight of authorities and from the authorities cited below it is not only apparent that parol evidence was properly admitted, but that appellee's claim was properly rejected.

Two very recent cases are:

Mercantile Trust Co. *v.* Ginbernat, 134 App. Div., 410.
Willmarth *v.* Hine, 137 App. Div., 528 N. Y.

Also:

Knickerbocker Life Insurance Co. *v.* Nelson, 7 Abb. N. C. (N. Y.), 180, citing
DeWolf *v.* Johnston, 10 Wheat., 385.
Vilas *v.* McBride, 62 Hun (N. Y.), 324.

And this is the law throughout the country.

Massa *v.* Dauling, 2 Str., 1243.
Scott *v.* Lloyd, 9 Pet. (U. S.), 418.
Tucker *v.* Wilamoniez, 8 Ark., 157.

Train *v.* Collins, 2 Pick. (Mass.), 145.
Denyse *v.* Crawford, 18 N. J. L., 325.
Grayson v. Brooks, 64 Miss., 410.

It must be borne in mind that in no instance could usury be shown where the parties had drawn a contract of the character in the case at bar unless parol testimony could be introduced to show the real arrangement, as well as the collateral agreement entered into between the parties showing their true relations.

The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent it was usurious.

Kohler *v.* Dodge, 31 Neb., 238, 47 N. W. Rep., 913.
Rowan *v.* Hanson, 11 Cush., 44.

Take the ordinary promissory note which is a contract or instrument to pay a certain sum of money for a consideration or for value received as therein expressed. The note itself is the written and binding obligation between the parties, and it has been repeatedly held that oral testimony could be introduced to show the relations between the parties and the agreement made with respect to the payment of usurious interest, even though the note on its face contained a provision for the payment of legal interest.

Roe *v.* Kiser, 62 Ark., 92; 34 S. W. Rep., 534.
McAleese *v.* Goodwin, 32 U. S. App., 650; 69 Fed. Rep., 759.

In all instances of this character, as well as in the case at bar the instrument is innocent and

valid on its face and it is only by resort to extrinsic facts and circumstances that it is invested with the element of illegality.

A contract may not necessarily be usurious on its face; the burden is on the one contesting it upon the ground of usury to prove the guilty intention and that the contract was a cover for usury and for the loan of money upon usurious interest (Rosenstein *v.* Fox, 150 N. Y., 304, and cases cited).

On these questions oral, extrinsic and circumstantial evidence is freely received.

Thomas *v.* Murray, 32 N. Y., 605.
Valentine *v.* Conver, 40 N. Y., 248.

V.

The order of the Circuit Court appealed from should be reversed and the order and judgment of the District Court affirmed.

Respectfully submitted,

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JACOB JNO. LAZAROE,
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Supreme Court of the United States

OCTOBER TERM, 1912,
No. 591.

CLARENCE S. HOUGHTON, as Receiver in Bankruptcy of the Assets and Effects of Abram L. Canfield, Bankrupt,
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against

WILLIAM H. BURDEN,
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BRIEF FOR APPELLEE.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

INDEX.

CASES CITED

Supreme Court of the United States,

CLARENCE S. HOUGHTON, AS RECEIVER IN BANKRUPTCY OF THE ASSETS AND EFFECTS OF ABRAM L. CANFIELD, BANKRUPT, Appellant, *vs.* WILLIAM H. BURDEN, Appellee.	October Term 1912. No. 591.

BRIEF FOR APPELLEE.

Statement.

This is an appeal by a receiver in bankruptcy from a decree of the Circuit Court of Appeals for the Second Circuit, reversing an order of the District Court for the Southern District of New York. The proceeding is of the sort commonly called a reclamation proceeding, and was instituted by William H. Burden, the appellee here, and appellant below, to procure an order directing the receiver of Abram L. Canfield, a bankrupt, to pay over certain moneys collected by the receiver on accounts which the bankrupt had assigned to the appellee. The matter was referred

to a special master who reported that the accounts were assigned in pursuance of an agreement which was wholly void for usury, and that they were the property of the bankrupt's estate; and this report was confirmed by the District Court. The order of confirmation was reversed by the Circuit Court of Appeals. The order of reversal does not show whether the reversal was upon the law, or upon the facts, or upon both (Record, p. 169).

Upon the hearing before the Master the following facts were established by evidence which is undisputed. In the month of April, 1910, Burden, who is conceded to be an expert bookkeeper and accountant of large experience (fols. 377-379), published in the New York Herald an advertisement in this form:

> Retired merchant, not desiring partnership, will loan established rated party $10,000-$20,000 (6%), same carrying responsible position. B., 139 Herald, Downtown.

(fols. 311-312; 328, 424). This advertisement was answered by a Mr. Arthur J. Kohler (fol. 311), and at a meeting which resulted the appellee told Koehler that he would lend from $10,000 to $20,000 in some good business, if he were given a position in that business which would pay him at least $50 a week (fol. 324). Koehler then saw the bankrupt and told him that he had a man who would lend the bankrupt $10,000 upon security, if given a position at a salary of $50.00 a week, in the way of "looking after the accounts and credits, and work pertaining to that particular line." The bankrupt replied that "he could use a good man," and thereupon Koehler arranged

for a conference between the bankrupt and Burden (fol. 312). This conference, however, resulted in no immediate arrangement, because the financial statement submitted by the bankrupt was about a year old, while Burden wished a statement of later date (fols. 314-316). Some five or six weeks later the matter was taken up again (fol. 347). Koehler had told Burden about a form of bond which the Fidelity & Casualty Company was issuing (fol. 316), and Burden, after examining this form of bond at the office of the company, told Koehler that probably some arrangement could be made with the bankrupt, if the latter would pay for the services which that bond would require (fols. 349-350), and would submit a statement of recent date. These matters were then arranged, and on the 14th of December, 1910, Burden and the bankrupt entered into a contract in writing by the terms of which they agreed as follows: The bankrupt was to assign to Burden approved accounts due from reputable debtors, and Burden was to pay therefor seventy-five per cent. of their face value. These accounts were to be for goods which had been accepted by the debtors, and which had been shipped from certain designated factories; and the original shipping receipts or invoices were to be submitted to Burden for his inspection at the time of the assignment. The collection of the accounts, however, was left with the bankrupt, who was to act as the agent of Burden in that respect. If any account should not be paid within ten days after falling due, the bankrupt was to pay the amount thereof to Burden, who was thereupon to re-assign the account; and in case of the failure of the bankrupt to make such

payment, Burden had the right, at his election, to revoke the agency of the bankrupt to collect any of the accounts then uncollected. By its terms, the contract was to apply to all purchases of accounts by Burden from the bankrupt. In addition to the above stipulations, the contract contained the following:

> "VIII.—The party of the second part [Burden] shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent. per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected."
>
> "IX.—When the amount collected on said accounts and turned over to the party of the second part shall amount to the total sum advanced thereon, with interest at the rate of six per cent. per annum, and the party of the second part shall have received out of said collections his compensation for services as above mentioned, and all disbursements made or liabilities incurred, for exchange, or for attorneys' fees, or other expenses in and about the collection of said accounts, he shall reassign to the party of the first part all accounts then uncollected."

The bond mentioned in the contract (fol. 406-423) was conditioned to indemnify Burden (1) if any of the assigned accounts should be fictitious, or (2) if the bankrupt should fail to pay over any part of the collections. By the express terms of the bond, the contract between the bank-

rupt and Burden was made a part thereof, and it was expressly stipulated, as a condition of the liability of the Surety Company (1) that Burden should enforce all the provisions of his contract with the bankrupt; (2) that he should require the bankrupt to state in writing at the time of assigning each account the date when the payment of such account would be due; (3) that if the payment of any account should not be made within twenty days after such date, he should thereupon immediately make demand upon the debtor by registered mail; (4) that he should require the bankrupt to file with him in connection with each account, a certificate signed by a responsible employee stating that the account referred to in the certificate represented a *bona fide* sale, and that the merchandise had been shipped to the customer; (5) that he should at least monthly make an examination of the accounts of the bankrupt which should embrace (a) a complete examination of the books, accounts and vouchers of the bankrupt respecting the accounts assigned, and (b) a strict comparison between all unpaid accounts as such accounts should appear on Burden's records and as they should appear in the books of original entry of the bankrupt.

In pursuance of the contract, the bankrupt, on the 16th of December, 1910, assigned to Burden 98 different accounts amounting in the aggregate to $13,334.34, and Burden paid him $10,000. therefor (fols. 159-168; 426). On the 5th and 13th of January, 1911, the bankrupt assigned to Burden 109 other accounts aggregating $14,291.14, (which are the accounts involved in the proceeding) and received therefor three checks amounting in all to $10,628.60 (fols. 10-22; 137-139; 426).

Two of these checks, amounting together to $8,628.60, he indorsed over to Burden, who thereupon re-assigned to him all the uncollected accounts included in the assignment of December 16th (fols. 160-426). The accounts so re-assigned amounted to $11,847.06; Burden having collected only $1,487.28 (165-167).

As to the matters so far mentioned, there was no contest and no conflict in the evidence. The dispute consists wholly as to what was said prior to the execution of the writing. The bankrupt, who was called as a witness by the receiver, was examined by counsel for the receiver concerning certain conversations which the bankrupt stated took place between him and Burden at the time of the execution of the written contract, and over the objection of Burden that all the negotiations of the parties were merged in the writing, and that the writing spoke for itself, this witness was allowed to testify that when the written agreement was submitted to him by Burden he asked Burden what was meant by the clause in reference to services, and that the latter replied "that that was simply to get around the usury law; there were no services to be performed at all" (fols. 257-258, 266-269). One of the subscribing witnesses—Miss Hess, who afterwards became Mrs. Herzog—was then called as a witness on behalf of the receiver, and over like objection and exception, was allowed to testify to conversations which she said took place between the bankrupt and Burden before the agreement was signed, and among other things was permitted to testify that she heard Burden say that the one per cent. was "to cover the bonus and usury charge" (fols. 279-280, 282-286).

Burden was then called on his own behalf, and denied that any such conversations occurred (fols. 363-366), and in this he was corroborated by Kohler, the other subscribing witness to the agreement (fols. 317-322). The referee and the District Judge credited the story so told by the witnesses for the receiver, and upon that testimony found that the contract was usurious and void.

I.

As the record does not show that the Circuit Court of Appeals passed upon the weight or preponderance of the evidence, the appellant cannot be heard to allege that the Court committed any error in that regard.

Of the twenty assignments of error filed by the appellant, eighteen refer to alleged errors respecting the weight of evidence, and two, the fifteenth and twentieth, are merely general statements that the court erred in reversing the order of the District Court and in not affirming that order (Record, pp. 170-173). Now, as respects the weight of evidence, there is nothing in the record to show that the Circuit Court of Appeals passed upon any such question, and these eighteen assignments are aimed at nothing except statements and arguments found in the opinion. But, as said by the Supreme Court of Illinois, the court reviews the judgment of the lower court, not its opinion. (Kehl *v.* Abram, 210 Ill. 218, 223).

Furthermore, this court has repeatedly held that the opinion is no part of the record. In Williams *v.* Norris, (12 Wheat. 117, 119-120), Chief Justice Marshall said: "It [the opinion] can be introduced for no other purpose than to suggest to the Superior Court those arguments which might otherwise escape its notice, which operated in producing the judgment, and which, in the opinion of the legislature, ought to be weighed by the Superior Court, before that judgment should be reversed or affirmed. If the judgment should be correct, although the reasoning by which the mind of the judge was conducted to it should be deemed unsound, that judgment would certainly be affirmed in the Superior Court." And the Chief Justice added the further observation, that the opinion could have no other influence on the cause than it would have if published in a book of reports. (See also Rector *v.* Ashley, 6 Wall. 142, 148).

So, in England *v.* Gebhardt (112 U. S. 502) the court said:

"Neither is the opinion of the court a part of the record. Our Rule 8, Sec. 2, requires a copy of any opinion that is filed in a case to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below." (See also Saltonstall *v.* Birtwell, 150 U. S. 417, 419; Stone *v.* United States, 164 U. S. 380, 382.)

It is true that after the passage of the Act of February 5th, 1867, the Court departed from the former rule so far as to look into the opinion to learn whether a Federal question was raised below. (Murdock *v.* City of Memphis, 20 Wall. 590, 633; McManus *v.* O'Sullivan, 91 U. S. 578; Gross

v. United States Mortgage Co., 108 U. S. 477). But it is obvious that this practice was adopted for reasons peculiar to that class of cases, since it is not always practicable to have the record show that a right or immunity under the constitution or laws of the United States was claimed and decided, and sometimes this can be made to appear only by evidence outside of the record; and from the necessity of the case, the court looks to the opinion, just as it sometimes receives a certificate from the state court. (See Murdock *v.* City of Memphis, 20 Wall. 590, 633).

But to allow the opinion to be used for this purpose is quite different from allowing it to be used as a basis for assigning errors. When the question is merely this—Was a certain contention made and passed upon? the opinion will furnish satisfactory evidence thereof. But when the question is—Has the court below committed any error for which the judgment or decree should be reversed? then the opinion cannot be conclusive; for though the higher court might not concur in anything said in that opinion, it might still find the decree or judgment to be correct. Besides, how would the case stand if, as often happens, there should be several opinions? Would the assignment of errors be aimed at one of them or at all of them?

That errors may not be assigned upon the opinion of the court from which the case is brought up is well established in the practice of the State Courts. For example, in Illinois, where the Appellate Courts—which are intermediate courts of appeal corresponding to the Circuit Courts of Appeal in the Federal system—are required by statute to briefly state in writing the reasons for their decisions, the Supreme Court of the State

has said: "To say that error can be assigned upon that writing seems little less than absurd. Those courts are required to pass upon questions of fact, but they are not required to state in their opinions that such duty has been performed, nor by what process of reasoning they reach their conclusions. * * * What the court below may have assigned as reasons for its decision can in no way affect the correctness of the judgment, however instructive it may be in ascertaining the points upon which the case was considered and decided in that court." (Pennsylvania Company *v.* Verstein, 140 Ill., 637, 640; 15 L. R. A. 798.) So, in a recent case the Court of Appeals of New York said: "While we require the opinions written to be printed and made a part of the record, they do not form a part of the judgment roll. We do not, therefore, look to the opinions for the purpose of determining the contents of an order, finding, or judgment, or its meaning. We only examine the opinions for the purpose of ascertaining the arguments made and the reasons given in support of the rulings and determinations made by the court whose order or judgment is under review" (Morehouse *v.* Brooklyn Heights R. R. Co., 185 N. Y. 520, 526).

If any proof were required of the unsuitableness of the opinion as a support for the assignment of errors, we have to look no further than the assignments filed in this case. The sixth, seventh, eighth and ninth go only to "the process of reasoning employed by the Circuit Court of Appeals" (see Randall *v.* N. Y. Elevated R. R. Co., 149 N. Y., 211, 213) and though they might be perfectly good, the decision of the court might still be correct.

In *Loeb* v. *Columbia Township Trustees* (179 U. S., 472, 485) this court, after deciding that the opinion of the Circuit Court "may be examined in order to ascertain whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States," was careful to add: "*By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.*"

Now, certainly in the present case, it would have been quite feasible to have had the record show the points decided by the Circuit Court of Appeals. Indeed, the appellant had only to follow the state practice, and have inserted in the order of reversal a recital showing whether the reversal was upon the law, or upon the facts, or upon both. (Van Tassell *v.* Wood, 76 N. Y., 614; Townsend *v.* Bell, 167 N. Y., 462, 467-469.) Then he would have had something against which he could properly direct his assignments of error. But as he has not caused it to appear by the order of reversal, or otherwise in the record, that the Circuit Court of Appeals passed upon the weight or preponderance of the evidence, he is in no position to say that the court committed error in that regard. Hence, the eighteen assignments in which errors of this character are set out present no question for review.

II.

The fifteenth and twentieth assignments are too general and indefinite to require notice.

As to the other two assignments of error, the fifteenth and the twentieth, while they refer to the record, they certainly do not set out with "particularity" the error asserted. To say that the Circuit Court of Appeals erred in reversing the order of the District Court, and in not affirming that order, points to no contention which the court might not infer from the mere fact that the appeal was taken. And as the order of the Circuit Court of Appeals does not show whether the reversal was upon the facts or upon the law, the court could discover the alleged error only by reading the entire record, and examining all the evidence and all the rulings. A plainer case of a failure to comply with the rule could hardly be imagined. In this respect, the case is like Fidelity & Deposit Co. *v.* Anderson (102 Ga., 551). There the cause involved questions both of law and fact, and was tried before the court without a jury. The assignment of error was a general one, not specifying how or wherein the trial judge erred in his judgment, whether as to matter of law or as to matter of fact. It was held that the assignment of error was too general to be considered, and the writ of error was dismissed. (See also Lytle *v.* Prescott, 57 Minn. 129).

In Deitsch *v.* Wiggin (15 Wall, 239, 246), the Court said: "That rule [No. 35] is necessary to the disposition of the business which presses upon us, and it is our intention hereafter to en-

force strict compliance with its demands. If errors are not assigned in the manner required, the assignments will be treated as if not made at all". (See also Deering Harvester Co. *v.* Kelly, 103 Fed. Rep. 261; Flickinger *v.* First Nat. Bank, 145 Fed. Rep. 162). Now, certainly these observations are quite as pertinent to-day as then. And while this court may sometimes notice a plain error of *law* not assigned, there can be no good reason why, in the absence of a proper assignment of error, it should read through all the evidence to discover whether the facts have been correctly decided.

III.

As the jurisdiction in this case exists solely by virtue of the bankruptcy act, which confers upon this court full power to make all rules respecting procedure, the court should adopt the same practice as that which it has established for "proceedings in bankruptcy" and should refuse to review the facts.

But assuming that the assignment of errors is sufficient, should this court undertake to review the facts? If this were a "proceeding in bankruptcy", the decision of the Circuit Court of Appeals upon the facts would be conclusive. (General Order XXXVI). But is there any reason

why a different practice should prevail merely because the appeal is in "a controversy arising in bankruptcy proceedings"? In the determination of this question, we are first to note the source of the jurisdiction. The parties are not, so far as the record shows, citizens of different states; nor is the construction of any Federal statute involved, but merely the application of a statute of New York; and the jurisdiction depends wholly upon the fact that one of the parties is a receiver in bankruptcy. The Bankruptcy Act, then, is the only source of jurisdiction.

Now, that act contains this provision; "All necessary rules, forms and orders as to procedure * * * * * and for carrying this act into effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." (Sec. 30). In pursuance of the power so conferred this court has promulgated a rule that in bankruptcy proceeding the court from which the appeal is taken must make findings of fact, which are conclusive here. (General Order XXXVI.) While this rule applies only to "proceedings in bankruptcy" the power of the court to regulate the mode of procedure is not limited to that particular class of proceedings. The words of the statute are "All necessary rules * * * as to procedure." This language is general and comprehensive, and fairly embraces the procedure applicable to any proceeding which originates in a court of bankruptcy. Nor is it important that the court has not yet adopted a rule by which the findings of the Circuit Court of Appeals are made conclusive in a "controversy arising in bankruptcy proceedings"; for as the court has power to prescribe *all* rules of proce-

dure, it is not material whether the power is exercised by promulgating formal rules, or by making rulings from time to time as occasion may require.

Now, having full power to prescribe a rule of practice which will limit the review in this class of cases to questions of law, why should the court not exercise that power? Certainly, public convenience will be served thereby. For what could be more absurd than that suitors who have questions of greatest moment to submit to the court should have to wait while the court, in a trivial case, and where the Federal jurisdiction is merely accidental, performs the most ordinary function of a common jury, namely, decides a question of veracity between witnesses?

That such a duty should be imposed upon the court even where the amount involved is ten thousand dollars, seems quite proposterous. But with this case as a precedent, where would the matter end? Receivers and trustees in bankruptcy have many controversies with third persons respecting the title to property claimed to be a part of the bankrupt's estate, and in most of these the issue of fact is as sharply contested as in the present case. Now, shall this court have to decide such an issue whenever either party sees fit to bring it here? When we recall that the jurisdictional amount is only one thousand dollars, we can easily see what consequences must follow. Trivial disputes, involving only questions of veracity between witnesses, would clog the docket, and seriously impede the proper business of the court. Certainly a practice which would result in such public inconvenience should be discouraged.

Indeed, the notion that a court of last resort should be called upon to review the facts in any case is fast becoming obsolete. In many of the States, as for example in New York, the highest court has been entirely relieved of this duty (See New York Code of Civil Procedure, §191). So, in England there seems to be a growing sentiment against a review of the facts in the House of Lords (See remarks of Lord Davey in Montgomerie *v.* Wallace, L. R. A. C. [1904] 73, 83). And now in that country, the Court of Appeal will not allow an appeal to the House of Lords in a bankruptcy case upon a question of fact. (Ex parte Miles, L. R. 2 Q. B. Div. 39, 47; In re Lake, K. B. Div. [1901] 710, 719; Ex parte Hyman, L. R. 8 Ch. Div. 11, 26). This practice would seem to furnish a just analogy for the procedure to be adopted by this court in "controversies arising in bankruptcy proceedings."

IV.

The point that the Circuit Court of Appeals had no power to reverse upon the facts is not well taken; but if this point is good, then the case should have been brought here by a writ of error, and the appeal should be dismissed.

There seems to be some inconsistency in the brief of the appellant in that by his assignment

of error his contention is that the Circuit Court of Appeals could not reverse, unless the decision of the special master as affirmed by the District Judge, was clearly against the weight of evidence, whereas in his first point he seems to contend that the Circuit Court of Appeals could not review the facts at all.

Now, even if the latter contention be conceded, how does it help the appellant? There is nothing in the decree of the Circuit Court of Appeals to show that the reversal was upon the facts; but for all that appears, the reversal might be upon some question of law. And even though we refer to the opinion to learn what the ground was, the mere circumstance that the court discussed only the question of fact is not sufficient reason for saying that it found no error of law. If the appellant desired to make this point, he should have had the decree show that the reversal was solely upon the facts, if indeed, such was the case.

Upon the present state of the record his contention, if conceded, places him in a position where he has nothing to argue. For he cannot point to anything in the record which shows that the Circuit Court of Appeals found all the questions of law in his favor; and since he says that that court could not review the facts, he must concede that his assignments of error, which have reference only to the weight of evidence, present no question for argument here; for very plainly if the Court of Appeals may not review the facts, neither may this court.

But assuming that the record shows that the circuit court of appeals reversed solely upon the facts, its power to do so cannot well be questioned

at this day. The case was a proceeding by intervention in the bankruptcy court, and it is well settled that in such a proceeding the case may be taken to the circuit court of appeals by *an appeal* (Hewitt *v.* Berlin Machine Works, 194 U. S. 296); and an appeal "opens both fact and law." (Duryea Power Co. v. Sternbergh, 218 U. S. 299 302).

That Campbell v. United States (224 U. S. 99) and the other cases cited on page 9 of the appellant's brief have no application to the present case is perfectly plain, since they were taken up by writs of error. But concede that they apply, and what is the result? In that event, the proper procedure for bringing the case here would be a writ of error, and the appeal must be dismissed.

V.

All of the testimony upon which the appellant relies to sustain his contention is incompetent and should be disregarded.

As the whole record is before the court, the appellee may sustain the decree of the Circuit Court of Appeals upon any tenable ground, and is not limited to the grounds stated in the opinion. (Ward *v.* Hasbrouck, 169 N. Y. 407). Now, the finding that the contract was usurious was based wholly upon testimony which the appellee, when it was received, objected to as incompetent, and which, he has maintained throughout the whole

proceeding, ought not to be considered at all. If, therefore, this objection is good, the appellant's contention fails.

The evidence relied upon by the appellant consists of the testimony of two witnesses—one of them a party, and the other a witness, to the written agreement—who testified to certain oral statements which they said they heard the appellee make before the writing was signed. One of these witnesses, the bankrupt himself, testified that when the appellee showed him the written agreement he asked the appellee what was meant by the clause relating to pay for services, and that the appellee replied "that that was simply to get around the usury law; that there were to be no services rendered at all." (fols. 257-258; 266-269). And one of the subscribing witnesses —a Miss Hess, who afterwards became Mrs. Herzog—testified that she heard the appellee say that the one per cent. was "to cover the bonus and usury charge" (Fols. 279-280; 282-286). All this testimony was taken over the objection of the appellee that the negotiations of the parties were merged in the written contract, and that the writing spoke for itself. (fols. 257-258; 266-267; 279-280).

Now, when the agreement was made it was manifest that in connection with the advances, the appellee would be required to perform certain services, which, as said by the District Judge, would be "undeniably substantial and vexations" (fols. 440-441); and the appellee had a legal right to stipulate that he should be paid for these services, in addition to the interest on the money advanced. (Thurston *v.* Cornell, 38 N. Y., 281; Matthews *v.* Coe, 70 N. Y., 237; Bennett *v.* Gins-

berg, 141 App. Div., 66). He then entered into a written contract which contains an express statement that certain sums shall be paid to him as compensation for such services. Now, what should be deemed evidence of the contract that he intended to make? The explicit language of the written agreement? or testimony of the parties and subscribing witnesses as to what was said at the time?

It will be noticed that the testimony was not introduced to explain or apply the language used in the written instrument, or to establish an entire agreement of which the written contract was only a part; but to strike out of the writing terms that the parties had written in, and insert other terms; and this for the purpose of destroying the contract by substituting for a condition which was perfectly lawful a condition which was unlawful. If this may be done, then the result must be this, that a man who has made a written contract, in which he has stipulated for money to be paid to him for a lawful purpose, may have his contract struck down, whenever persons can be found to swear that before the contract was signed he stated orally that he did not intend that the payment should be made for the lawful purpose stated in the writing, but for a different and unlawful purpose.

A case presenting a plainer infraction of the rule excluding parol evidence could hardly be imagined. One of the parties to a written contract explicit in its terms and complete upon its face, was called to testify to oral declarations of the other party, which tended to contradict the express language of the writing, and which were made before the execution thereof, and a person

who had placed her signature upon the paper as a subscribing witness was called to corroborate this testimony. This party and this subscribing witness were then flatly contradicted by the other party and by the other subscribing witness, so that what was received as evidence of the agreement, was not the writing which had been so signed and witnessed, but the recollection of the parties and the subscribing witnesses; and the courts instead of referring to the formally executed paper to ascertain the intention of the parties, have attempted to settle the question of veracity between them. If such a thing was ever done before, the case has not got into the reports.

Of course, people should not be allowed to circumvent the statute against usury. But anxiety to enforce that antiquated enactment—an anxiety certainly never displayed by the Courts of the State (See Re Samuel Wildes' Sons, 133 Fed. Rep. 365)—should not impel this Court to adopt a rule which would enable dishonest persons to make a wrongful use of that statute, and place honest lenders at the mercy of rascally borrowers. With the decision in this case as a precedent, what lender would be safe, if the written contract should provide for any payments at all, except for principal and interest? If this rule is to prevail, then wherever a draft drawn for a certain sum with six per cent. interest contains a provision for the payment of exchange, the acceptor may escape payment by calling witnesses willing to swear that when the draft was signed the drawer declared that the provision for exchange was intended for "the usury." (See Marvins *v.* Hymers, 12 N. Y., 223). So, whenever a lawyer, putting out his own money on bond

and mortgage, stipulates for the payment of his fees for examining the title, the security may be avoided, if the mortgagor can produce persons to testify that when the contract for the loan was made, the lender stated that the provision for the expenses of such examination was intended "to get around the usury law." So, whenever the written agreement for a loan contains a stipulation for paying the expenses of the borrower in examining the property, or for making a survey, or for insurance, or for like trouble or expense, the borrower may get rid of his obligation if he can only find persons to swear that at the time the writing was executed the lender stated orally that this was intended as a "bonus". So, in the same way, whenever a factor enters into a written contract under which he stipulates for interest on his advances, and also for commissions on the sales, the shipper may destroy the contract by swearing to an alleged oral declaration of the factor that the commissions were for the "usury." (See Matthews *v.* Coe, 70 N. Y., 239).

Contracts such as these are of daily occurrence; in fact, nearly all contracts for loans upon real estate, or for advances upon any security, except bonds or stocks or commercial paper, provide for the payment of something besides interest, and if, in such cases, witnesses are permitted, as said by the Court of Appeals of New York (Lossing *v.* Cushman, 195 N. Y., 386, 390), "to swear out of the contract something that the parties have written in, and to swear into the contract something that the parties have not written in," what security does the writing afford to the lender, no matter how innocent he may be? Such a rule, as said in the case just cited, "would leave

no contract safe, and the most prudent person could not erect a barrier against misunderstanding, forgetfulness or *perjury*."

Again, if evidence of this character may be introduced for the purpose of showing that the contract was usurious, why may it not be used to invalidate contracts upon other grounds? Why may it not be used in any case where either party can make a plausible claim that the other party had an illegal intent? For equally good reasons, a lease may be destroyed by oral testimony which will substitute an illegal condition for one of the valid conditions set out in the instrument. So, a contract to buy or sell something that may be lawfully dealt in, might be destroyed by testimony that the other party said before the contract was executed that it was intended to cover articles which the law did not permit to be sold.

In his opinion, the District Judge said: "I regard *Scott* v. *Lord* (9 Peters, 418, 446), as controlling." (fol. 435). But a reference to that case will disclose that it is no authority for the admission of such evidence as was received in this case. There the instrument before the court granted a ground rent, and contained a covenant for a re-conveyance by the grantee, upon the payment of $5,000, and an adjustment of the rents; and the point decided was that the Court was not bound by what appeared upon the instrument alone, but might look to all the surrounding circumstances. There was no attempt to impeach the instrument itself; but every word of the writing was given full force and effect. In fact, nothing more was done in that case than is done in the ordinary case where a grantor is allowed to show that a deed absolute in form was intended

as security for a loan, or that a sale with a right of re-purchase was intended as a mortgage.

There seems to be no reason why the competency of this evidence is not a question of general law to be decided by this court according to its own views. But if the question is to be deemed one of local law, Potter *v.* Tallmann (35 Barb. 183) appears to be directly in point, and there being no decision of the highest court of the State upon the question, should be accepted as controlling. That case was an action upon a certificate of deposit dated at the "Banking House of Tallman, Powers & McLean, Davenport, Iowa." The rate of interest mentioned in the instrument was ten per cent., and the defendants, having pleaded usury, sought to prove that the intention of the parties was that the money should be paid at Poughkeepsie, New York. But the court held that as this evidence would contradict the express terms of the writing, it was inadmissible. The Court said: "It suited the parties to put the contract in writing, and we are therefore to ascertain the place where the contract was made, the time when and the place where the money was payable, as well as the rate of interest, by reference to the contract itself. The primary object of resorting to a written instrument, in which to incorporate the stipulations of the agreement, was to avoid the uncertainty, the doubt and the insecurity of a contract resting merely in parol. Upon its face, it professes to have been made at Davenport, Iowa. This it does in plain and explicit terms. * * * The offer of the defendants, which the judge rejected as illegal and inadmissible, was nothing else than an effort to vary and change the terms

of the written contract by parol evidence—to show the money was not to be repaid at Davenport, Iowa, where the contract plainly said it was to be repaid, but in Poughkeepsie, in the State of New York, where the certificate in as plain terms said it was not to be repaid, and thus bring it within the prohibition of the statute of usury of the latter state. A reference to some few authorities will show that parol evidence is not admissible for any such purpose."

Nor does Mudgett *v.* Goler (18 Hun, 302), which is cited in the opinion of the Circuit Court of Appeals (record, p. 167) establish any different rule. That was a suit to foreclose a mortgage, which was collateral to a bond executed by the defendant for the payment of $5,000, "with interest semi-annually." The evidence which was held admissible was the testimony of the defendant that at the time of giving the bond and mortgage he had agreed to pay interest at ten per cent. per annum, *and had actually paid interest at that rate.* Now, this amounted to no more than showing facts in addition to those disclosed by the writing; in other words, the defendant was allowed to show the transaction in its entirety. But he was not permitted to testify to oral declarations of the mortgagee flatly contradicting the express language of the writing, and to substitute these oral declarations for the writing itself, as was done here.

If, in the present case, the written agreement had contained no mention of the additional one per cent., then the case would have been within the principle of Scott *v.* Lord (*supra*) and Mudgett *v.* Goler (*supra*), and parol evidence would have been admissible to show that, in addition to

what appeared upon the face of the writing, there was an agreement to pay this one per cent., and upon all the facts, both those shown by the writing and those proved by parol, the court would have been required to decide whether the transaction was usurious. When, however, the written agreement is complete, and discloses the entire transaction, there can be no necessity for resorting to parol evidence, but the court may decide the question of usury upon the writing itself. Of course, the court may, as in other cases, look to the state of facts to which the terms of the contract are applicable. For example, the court may look to the facts respecting the services to be rendered, and if those services appear to be merely trifling, may infer that the stipulation was intended as a cover for usury. But this is a very different thing from admitting parol declarations for the purpose of striking out of the contract a condition that is there and putting in a condition that is not there.

VI.

But even if the testimony as to the oral declarations of the appellee is deemed competent, the evidence was insufficient to meet the burden of proof.

If evidence of oral declarations inconsistent with the terms of the written agreement are to be received at all, then certainly the court should

at least proceed with caution in giving effect to them, especially where the only testimony as to those declarations is given by one of the parties and by one of the subscribing witnesses, and the other party and the other subscribing witness testify that nothing of the sort was said. To begin with, the burden of proof, as said by the Circuit Court of Appeals in its opinion, is strongly upon the Receiver.

In White *v.* Benjamin (138 N. Y. 623, 624) the Court of Appeals of New York said: "Usury is a crime, and he who alleges it as a defense to an obligation to pay money must establish it by clear and satisfactory evidence. He enters upon the defense with the presumption against the violation of the law, and in favor of the innocence of the party charged with the usury. He cannot properly claim to have the usury inferred where the evidence is inconclusive and just as consistent with the absence as with the presence of usury. It is a just requirement that all the facts constituting the usury should be proved *with reasonable certainty*, and that they shall not be established by mere surmise and conjecture, or by inferences entirely uncertain."

And in Stillman *v.* Northrup, (109 N. Y. 473, 478), Earl, J., said: "The defense of usury involving crime and forfeiture cannot be established by mere surmise and conjecture, or by inferences entirely uncertain. If, upon the whole case, the evidence is just as consistent with the absence as with the presence of usury, then the party alleging the usury has failed."

See also

Rosenstein *v.* Fox, 150 N. Y. 354.
Matthews *v.* Coe, 70 N. Y. 239, 243.

Re Samuel Wilde's Sons, 133 Fed. Rep. 562.
Klein *v.* Title Guaranty Co., 166 Fed. Rep. 365.

Under this rule, it is not sufficient for the Court to surmise or conjecture that the stipulation respecting compensation for the labor and services to be performed and time to be expended by the appellee was a cover for usury, but that this was so, must appear with reasonable certainty.

Now, whether or not the transaction was usurious depends upon Burden's intent. (Thurston *v.* Cornell, 38 N. Y. 281; Davis *v.* Marvine, 160 N. Y. 269). If the stipulation for compensation for his time and services was intended as a mere cover for illegal interest, there was usury, but if he actually intended just what he stipulated for, then there was no usury. To get a correct notion of his intent, we should begin with his advertisement which was the inception of the business. In that advertisement, he said, "Retired merchant, not desiring partnership, will loan established rated party $10,000-$20,000 (6%) same carrying responsible position." The motive behind this is quite plain. The advertiser wished to obtain a position, and to aid him in this effort, he offered to lend $10,000 or $20,000 at six per cent. His primary object was to get employment, and the offer of a loan was held out merely as an inducement to the other. And when he saw the broker who answered the advertisement, he stated that he would lend from $10,000 to $20,000 in some good business, "provided he should receive a position there that would pay him at least $50 a week," (fols. 324; 326-327) and, as stated by the broker, "that was his idea all the time" (fols.

346-347). Then when the matter was first submitted to the bankrupt by the broker, and the bankrupt was informed that, as a part of the transaction, Burden would want a position in the business, the bankrupt said "he could use a good man" (fol. 312). So far, there is no conflict in the evidence; and while the evidence as to what else was said at the conference between the bankrupt and Burden is quite conflicting, the receiver's own witness, Herzog, testified that Burden told the bankrupt that "what he wanted to do was to have employment there". (fols. 296-297).

Up to this point, it is clear that it was not his purpose to put out his money at a high rate of interest, but merely to use the loan as a means of getting employment. Now, is there anything in the evidence to show that that purpose was changed? The plan with reference to a bond was suggested by the broker (fols. 316, 331-332), and Burden, having examined the form of bond that the Fidelity & Casualty Company was issuing in such cases, found that it required services to be performed in the line of his own profession as an accountant. On this point, the uncontradicted testimony of the broker is: "I said to Mr. Burden that provided the new statement was satisfactory to him, would he make some arrangement with Mr. Canfield provided Mr. Canfield would give a surety bond and Mr. Burden told me that the Fidelity & Casualty Co. bond provided for certain work and contingencies and it seemed to him a satisfactory way of concluding business with Mr. Canfield, and if the statement was satisfactory he would make some arrangement with him" (fols. 331-332).

Now, all this evidence bears out Burden's statement, when he testified, as he had a right to do

(Davis *v.* Marvine, 160 N. Y. 269, 274-277) that he intended to charge for his services exactly as stated in the agreement; that he had at no time any intention to charge more than six per cent for interest on his advances; that the stipulation was inserted in the agreement in perfect good faith, and was not intended as a subterfuge to cover usury (fols. 375-376).

That Burden had the right to exact pay for his time and services in addition to the interest on the money advanced is clear. (Thurston *v.* Cornell, 38 N. Y., 281; Bennett *v.* Ginsburg, 141 App. Div., 66; Matthews *v.* Coe, 70 N. Y., 237). And when we turn to the bond we find that the services which he would be required to perform were substantial, indeed, the District Judge himself concedes that they were "undeniably substantial and vexatious" (fols. 440-441). The bond, by its terms, made the contract a part thereof, and it required that Burden should *observe and enforce* all the provisions of the contract. One of these provisions was that the original shipping receipt or invoice should be submitted to Burden for his inspection at the time of the assignment; and very plainly, the bond, by implication, required him to make this inspection. Now, in each assignment there were a number of accounts most of which embraced several shipments. In the assignment of January 5th, there were 63 different accounts which embraced 225 different shipments (fol. 402); and in the assignment of January 13th there were 46 accounts embracing 239 shipments (fols. 10-23; 398-402). There were thus nearly 500 shipping receipts or invoices to be examined at the outset. But what was more important, Burden was required to make *a complete examination at least once a month*—and circumstances might have

rendered more frequent examinations necessary—of the books, accounts and vouchers of the bankrupt as respects the accounts assigned, and to make a strict comparison between all unpaid accounts as the same should appear on Burden's records, and as they should appear on the books of original entry of the bankrupt (fols. 414-416).

Now, it is obvious that this work would necessarily require some time. Burden—who is conceded to be an expert bookkeeper and accountant (fols. 378-379)—testified that when he made the contract, he estimated that these examinations would take from five to six days each month (fols. 369-375); and on this point, he is wholly uncontradicted, for the receiver and his counsel did not attempt to show, by cross-examination of the witness or otherwise, that the estimate was out of the way. This estimate, as explained by the witness, was based upon an assumed advance of $10,000, so that his compensation, as fixed by the contract, would come to something less than $20 a day, at the most. Now, is it at all unreasonable that an expert accountant and one who had been the president of a national bank (fol. 379), should stipulate for compensation for his time and services at such a figure? Most of us who have occasion to employ accountants would be glad to pay such a rate; for hardly ever do we escape for less than $25 a day.

Besides, by taking this work upon himself, Burden had to forego all regular employment as office manager or accountant upon a salary—the thing he had been seeking—and like every other man engaging to do work which precludes him from doing other things, he had to consider this circumstance when stipulating for his compensation.

Furthermore, Burden, when he made the contract, had to assume, as he says he did (fols. 372-374), that some of the accounts might not be paid by the debtors, or taken up by the bankrupt, within the time mentioned in the bond, and that in such event, he would have to make demand upon the debtors by registered mail and assume the collection of the accounts, which very plainly would require much more labor and time.

Now, is it at all likely that any man would take upon himself all this labor and trouble merely for the privilege of lending his money? He might do that without going to any trouble at all, and upon much better security than assigned accounts. Would any one expect a lawyer, lending his own money on bond and mortgage, not to exact compensation for examining the title? But when the lender is an accountant, and the transaction involves labor on his part in the line of his profession, why should he be expected, any more than a lawyer, to give his services for nothing? When a lawyer, in the case mentioned, makes a contract by which he is to be compensated for examining the title, and the charge for this is not grossly excessive, no one thinks of saying that the transaction is suspicious. Why, then, should it be thought suspicious that an accountant, in a like case, stipulates that he shall be paid for examining bills of lading, books, vouchers and invoices?

Nor is it a suspicious circumstance that the compensation is to be measured by computing a percentage upon whatever part of the advance made by Burden should remain uncollected upon the accounts; for it is obvious that the amount of work must depend entirely upon the amount outstanding. If, for example, there were only $1,000

outstanding, there would be only a few accounts involved, and the examination being limited to the entries, vouchers, etc. relative to these accounts only, would require a comparatively small amount of time and labor; while, if $9,000 or $10,000 was outstanding, there would be nine or ten times as many accounts to be looked after, and nine or ten times as much work to be done. This method of computing the compensation, therefore, was not only a natural one, but the fairest and most equitable that the parties could adopt. To take again the case above supposed, of a lawyer lending his own money on bond and mortgage, does he not fix the charge for examining the title by computing a percentage on the amount of the loan? But no one thinks that there is anything wrong about this. Yet the labor of examining a title may be just the same whether the loan is one thousand dollars or ten thousand dollars, while in the present case, the quantity of labor is accurately measured by the amount of the advance outstanding. And as this is the measure of the services to be performed, may it not reasonably and properly be made the measure of the compensation for those services?

If we are to say that the provision respecting compensation for services was only a cover for usury, we must resort to a number of assumptions. First, we must assume that the writing does not express the real intention of the parties. Then we must further assume that Burden intended to make the examinations for nothing, or to make no examinations at all. But why should we say that he meant to make no charge for something he had a right to charge for in order that he might charge for something for which he was for-

bidden to charge? And as to assuming that he did not intend to make the examination, why should we think that, after having required a bond, he meant to release the surety company from liability by failing to comply with the conditions on his part? Inferences of this sort would be unwarranted in any case, much less in a case where every presumption is in favor of the contract.

Upon the hearing, the receiver attempted to show that Burden rendered no services *to the bankrupt.* But how is this material? The examinations required by the terms of the bond were not designed for the benefit of the bankrupt, but for the protection of his surety. Nor does this fact affect the validity of the contract; for the usury law does not prevent a borrower from contracting to pay for services rendered to a third person.

Nor is it important that when the bankruptcy occurred, Burden had made only a partial examination of the books. The obvious reason of the surety company for requiring this examination was, among other things, to prevent embezzlement of the funds by the bankrupt; and for this purpose an examination made immediately after the assignment of accounts would be useless; but to accomplish the end desired, the examination must have been deferred until such time as it might be likely that the bankrupt would have made some collections. Now, the first lot of accounts assigned, having matured within two weeks, and being re-assigned to the bankrupt, there was no necessity for examining the books as to them; and as to the assignments of January 5th and 13th, which embrace the accounts in controversy, the time for

making the examination respecting them had not arrived when the petition in bankruptcy was filed on the 16th of January. But as none of these accounts would become payable until April 1st (fols. 10-23), Burden, except for the bankruptcy, in addition to examining the shipping receipts and invoices, which he did (fols. 368-369), would have been required at least once each month for several months, to make a complete examination of the books, accounts and vouchers of the bankrupt covering them. There is nothing, therefore, in the subsequent conduct of the parties to warrant the inference that the stipulation to pay for services was intended for any purpose except that declared in the contract.

We may next consider whether the testimony of the bankrupt and the subscribing witness Hess (or Herzog) is inherently probable. Now, to take first the statement of the bankrupt, that at their very first interview Burden stated his desire to become a partner, does this appear at all credible? There is scarcely anything about which business men are more careful than about entering into partnerships, and before they go into an arrangement which enables another man to pledge their credit, and to incure obligations for which they will be liable, they want to be thoroughly satisfied about many things besides the mere matter of the assets and liabilities of the business, and particularly do they want to know all about the personality of the man with whom they are to be so intimately associated, and whom they will have to trust so implicitly. A man of ordinary prudence would avoid a hasty alliance of this sort as much as he would avoid a hasty marriage. Is it at all likely, then, that Burden, on the very first

occasion that he met the bankrupt, and without knowing anything about his habits or his disposition, or his associations, would propose a partnership? A man would have to have a very different training from that of an accountant, to do anything so rash. Besides, the advertisement put in evidence by the receiver (fol. 424) shows that a partnership was the very thing Burden did not want. And with this idea so prominently in his mind, that he was impelled to state it in his advertisement, is it credible that he proposed, what no sensible man, even if he had not had his mind so fixed, would have thought of proposing?

The testimony of the bankrupt as to what was said by Burden when the contract was signed, as to the purpose of the provisions for compensation for services, is also incredible. His testimony on this point is that when the written contract was shown to him he asked Burden what this provision was for, and that Burden said that it was simply to get around the usury law, and that there were no services to be rendered (fols. 268-269). Now, if Burden had it in his head to circumvent the usury statute, would he not have kept that purpose concealed? If he had wit enough to devise such a scheme, he would have wit enough not to talk about it. If he had any plan of the sort, it was aimed against the bankrupt alone, and the bankrupt being the only person who could complain of it, would be the last person in the world to whom Burden would be likely to declare his purpose. Is it probable, that having taken the trouble to have his lawyer prepare a contract which would not violate the law, that he would go to the very man with whom he expected to make

that contract and say to him that notwithstanding it was apparently legal, it was in fact illegal? Would he thus voluntarily furnish a perfect defense to the very man he was seeking to bind? Besides, why should he have said that there were no services to be rendered, when he knew that the conditions of the bond demanded services? The testimony given by bankrupts is often a tax upon one's credulity, but rarely has one of them told a more improbable story than this.

Furthermore, it clearly appears that when the contract was made the bankrupt was obtaining Burden's money under a false pretense. The statement which he rendered to Burden, and which the latter had exacted as a condition of doing business, shows an indebtedness of only $33,552.13 and a surplus of $70,713.90, with a net gain for the year of $5,100 (fols. 402-404). But his schedules disclose that only about six weeks later his indebtedness amounted to $67,229.78 (fols. 427-431). Of course, it is possible that in this short interval his indebtedness had doubled. But there is no evidence to that effect, and certainly if this had been the fact it could have been easily established; and in the absence of proof the court may hardly presume that this was the case, especially when the bankrupt, having the opportunity to explain it, refused to do so, and when asked as to the truth of the statement, took refuge behind the plea that an answer to the question would tend to convict him of a crime (fols. 301-304).

It is true that Burden had a pecuniary interest in the result, but such an interest does not necessarily discredit him (Hull *v.* Littauer, 162 N. Y., 569, 572-573). Nothing in the evidence shows that

he is an untruthful man, while the bankrupt appeared before the court as a rascal, who had practiced a gross deception, and who stood in danger of a prosecution for larceny upon Burden's complaint (Penal Law [New York], Sec. 1290); and in such a situation, what is more natural than for the man confronted by proofs of his wrong-doing to cry *tu quoque?* To involve the injured party himself in a criminal liability (Penal Law [New York], Sec. 2400) is a favorite recourse of rogues in such a plight.

As to the evidence of the two subscribing witnesses, why should the court believe the witness Herzog rather than the witness Koehler? To say that the latter has an interest because he was the broker is merely fanciful. He had nothing to do with preparing the contract, and was in no way responsible for what the parties did. Besides, he had known the bankrupt for some time, and had done business for him before (fols. 356-357), while his acquaintance with Burden was but recent, and confined to this one piece of business. His testimony is consistent throughout, and his answers to all the questions put to him, whether upon the direct or cross-examination, are responsive, direct and in no way evasive. On the other hand, the witness Herzog had been associated with the bankrupt for fifteen years (fols. 277-278) and had acted for him in a confidential capacity (fols. 275-276), and that she should be under his influence is certainly much more likely than that Koehler should be under the influence of Burden. Besides, Koehler is corroborated by the statements in the writing itself, and the presumption that the writing does express the true intent of the parties is always a strong one. (Nevins *v.* Dunlap, 33 N. Y. 676, 680.)

In his opinion the District Judge says that the question resolves itself into a consideration of whether the compensation agreed upon was "clearly too much to pay for this work" (fols. 440-441). Now, surely, this can hardly be the true test. Is a man who has stipulated for compensation for his services in connection with a loan to forfeit his principal whenever a judge or jury shall be of opinion that the amount charged was excessive? If this were the rule, no man could make such a contract with safety. Of course, where the amount agreed upon as compensation for time and services is out of all reason, this fact may be some evidence of an unlawful intent, just as a grossly inadequate consideration for a conveyance may be some evidence of fraud. But that the compensation agreed upon is large, or more than the court might think the services to be worth, will not of itself warrant the conclusion that the agreement was intended as a cover for usury. Men's notions concerning the value of their own services are often so widely different from the notions of other men on that subject, that any man may honestly believe his services are worth a good deal more than other men would concede them to be—a fact of which we have daily proofs in all kinds of employment. Indeed, many men, in all good faith, place a valuation upon their services which other men regard as absurd. The fact, then, that a man has demanded for his services a larger amount than others might think those services worth has but little tendency to prove that he acted in bad faith. Where a man who has conveyed his property seeks to establish fraud in the conveyance by proving inadequacy of price he is bound to show

that the inadequacy is so gross as to be of itself clear evidence of fraud (Parmelee *v.* Cameron, 41 N. Y., 392, 395-396; Tennant *v.* Tennant, L. R. 2 H. L. Sc. App., 6); but the rules respecting proof of usury are quite as strict as those respecting proof of fraud, if not more so (White *v.* Benjamin, 138 N. Y., 623, 624), and by analogy to the rule adopted where fraud is the issue, the receiver, who alleges usury, should be required to show that the value of the services was so grossly inadequate as to warrant no other inference than that Burden, when he stipulated for the compensation mentioned in the agreement, must have acted in bad faith.

As the evidence was introduced for the purpose of showing that the writing did not express the true intent of the parties, the case may be considered in this way:—Suppose the court were now asked to reform the writing, so to express the real agreement, would the evidence be sufficient to warrant a decree to that effect? Certainly no one would make that contention (Mead *v.* Westchester Fire Ins. Co., 64 N. Y. 453, 455). But why should the court be more lax, where the writing is attacked for the purpose of working a forfeiture? If there is any difference between the two cases, it is in the latter that the more stringent rule should be applied.

VII.

The order of the District Court was erroneous for the reason that the right of the bankrupt to avoid the assignment for usury without offering to pay the money advanced to him did not pass to the receiver.

In determining the rights of the parties we must bear in mind that the proceeding is equitable in its character, and that the rights of the parties are governed by equitable rules (Bardes *v.* Hawarden Bank, 178 U. S. 525, 535; in re Chose, 124 Fed. 753, 755; Batchelder & Lincoln Co. *v.* Whitmore, 122 Fed. Rep. 355, 360). The question then is, How would a court of equity deal with the situation? To settle this point, we must first ascertain what rights of the bankrupt were acquired by the receiver.

Assuming that he has all the rights which the statute confers upon the trustee, he is vested with "property which prior to the filing of the petition he [the bankrupt] could by any means *have transferred.*" (Bankruptcy Law, Sec. 70). Now, what rights could the bankrupt transfer? This is defined by Section 375 of the New York statute known as the General Business Law, which is as follows: "A cause of action to cancel, or otherwise affect, an instrument executed, or an act done, as security for a usurious loan or forbearance, can be transferred, where the instrument or act creates a specific charge upon property, which is also transferred in disaffirmance thereof, and not otherwise; but, in that case, the transferee does not succeed to the right, conferred by

statute upon the borrower, to procure relief, without paying, or offering to pay, any part of the sum or thing loaned."

This section was formerly section 1911 of the Code of Civil Procedure, and was first enacted in 1880. As stated by Mr. Throop, in his note to the section, (Throop's Code), it was intended to codify the rule laid down in some of the decisions, among which was *Wheelock* v. *Lee,* (64 N. Y. 242). That case was an action by an assignee in bankruptcy to recover moneys alleged to have been paid by the bankrupt in excess of legal interest on various loans, and to require the lender to deliver up the note made by the bankrupt upon the alleged usurious loan, and also certain other notes alleged to have been transferred as collateral security thereto. The court held that the action was not maintainable, because the plaintiff, who was "an assignee by operation of law", had not offered to pay the sum actually loaned.

Now, from this it is apparent that the relief granted to the receiver in this case, viz., a direction that Burden re-assign the accounts to him (fol. 461) is one which the State Courts would not have granted, without at least imposing as a condition that the receiver pay the sum actually advanced by Burden. But as this proceeding is equitable in its character, and as the question arises upon a State statute, why should the court of bankruptcy not deal with it exactly as it would be dealt with, if it had arisen in a State court sitting in equity?

VIII.

The usury laws of New York, as they at present exist, deny to the appellee the equal protection of the laws.

If the appellant had filed any pleading containing an averment that the contract was in violation of the State statute avoiding contracts in which more than six per cent. interest is agreed for, the appellee, intending to question the constitutionality of that statute, might have been required to raise that question in some appropriate pleading on his part. But as the appellant did not file any pleading, and did not otherwise apprise the appellee of his intention to rely upon this statute, the appellee had no opportunity to introduce the issue in this way. All he could do was to call the attention of the court to the point, in the brief submitted by his counsel, which was done.

If, however, some exception is necessary to raise the question, it fairly arises upon the exception to the admission of the testimony respecting the oral declarations of the appellee. When this testimony was offered the purpose of it was not stated, and the appellee, not being apprised of that purpose, could not interpose any objection, except the objection usual in such cases, that the negotiations of the parties had been merged in the writing, and that the writing itself was the only evidence of their agreement. When, therefore, the appellant seeks to show the competency of that evidence by calling the attention of the court to a statute, which he has not referred

to in any pleading or in the course of the trial, surely the appellee who has objected to the evidence and excepted to its admission, should be allowed to sustain his exception by insisting that the statute so relied upon to furnish a justification for the evidence deprives him of a right guaranteed to him by the constitution of the United States. (See People *v.* Houghton, 182 N. Y. 301, 304).

The statutes of New York upon the subject of usury so far as they are material here are as follows:

"The rate of interest upon the loan or forebearance of any money, goods or things in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time." (General Business Law, Sec. 370).

"No person or corporation shall, directly or indirectly, take or receive in money goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed." (Id. Sec. 371.)

"Every person who, for any such loan or forbearance, shall pay or deliver any greater sum or value than is above allowed to be received, and his personal representative, may recover in an action against the person who shall have taken or received the same, and his personal representatives, the amount of the money so paid or value delivered, above the rate aforesaid, if such action be brought within one year after such payment or delivery. If such suit be not brought within the said one year, and prosecuted with effect, then

the said sum may be sued for and recovered with costs, at any time within three years after the said one year, by an overseer of the poor of the town where such payment may have been made, or by any county superintendent of the poor of the county, in which the payment may have been made." (Id. Sec. 372.)

"All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods, or other things in action than is above prescribed, shall be void. Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, security or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled." (Id. Sec. 373.)

"In any case hereafter in which advances of money, repayable on demand, to an amount not less than five thousand dollars, are made upon warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, bonds or other negotiable instruments pledged as collateral security for such repayment, it shall be lawful to receive or to contract to receive and collect, as compensation for making such advances, any sum to be agreed upon in writing by the parties to such transaction." (Id. Sec. 379.)

"Every bank and private and individual banker doing business in this state may take, receive, reserve and charge on every loan and discount made, or upon any note, bill of exchange or other evidence of debt, interest at the rate of six per centum per annum; and such interest may be taken in advance, reckoning the days for which the note, bill or evidence of debt has to run." (Banking Law, Sec. 74).

"The knowingly taking, receiving, reserving or charging a greater rate of interest shall be held and adjudged a forfeiture of the entire interest which the note, bill of exchange or other evidence of debt carries with it, or which has been agreed to be paid thereon. If a greater rate of interest has been paid, the person paying the same or his legal representatives may recover twice the amount of the interest thus paid from the bank or private or individual banker taking or receiving the same, if such action is brought within two years from the time the excess of interest is taken. The purchase, discount or sale of a *bona fide* bill of exchange, note or evidence of debt payable at another place than the place of such purchase, discount or sale at not more than the current rate of exchange for sight draft, or a reasonable charge for the collection of the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than six per centum per annum." (Id.)

"The true intent and meaning of this section is to place and continue banks and private and individual bankers on an equality in the particulars herein referred to with the national banks organized under the act of congress entitled 'An act to provide a national currency secured by pledges

of United States bonds, and to provide for the circulation and redemption thereof, approved June third, eighteen hundred and sixty-four.' " (Id.)

Now, it will be seen that these statutes do not affect all persons alike, and are not uniform in their operation. All persons and corporations are forbidden to take more than six per cent interest, but the penalties for violating the law are different in different cases. Nor is this difference made to depend upon any classification of loans, but entirely upon the question, Who is it that has broken the law? If the contract now before the court had been made by a bank, or an individual banker, or a private banker, then (assuming it to be usurious, the penalty would be only a forfeiture of the interest (Caponigi *v.* Altierie, 165 N. Y. 255.) But because the appellee can not bring himself within that favored class, he is to forfeit his entire principle!

The reason for this discrimination in favor of banks and bankers is stated in the statute itself, viz: that the legislature intended to place them on an equality with the banks organized under the National Bank Act; and the highest court of the State has held that this statement is controlling. (Farmers Bank *v.* Hall, 59 N. Y. 53). But is this a sufficient reason to take the case out of the constitutional requirement that "no state shall deny to any person within its jurisdiction the equal protection of the laws"? If it is, then the constitutional guaranty in a matter of this sort would amount to very little. Upon that theory, the legislature could include within the class subject to the lesser penalty, all persons and corporations competing with the citizens

or corporations of other states and countries, and could leave the heavier penalties to be borne only by those who have no such competitors. Thus, it might, with equal good reason, include the insurance companies of the State among those liable only to a forfeiture of the interest. So, it might place in this class all loan companies organized under the State law, or all persons doing business as factors, or cotton-brokers, or warehousemen, in short, all persons who, in the ordinary course of their business, make advances to their customers, and who have to compete with concerns in Jersey City or Philadelphia or Chicago or Boston, or elsewhere. If it is once admitted that the reason declared by the legislature for the discrimination in this case will warrant the imposition of different penalties upon different persons for the same thing, then, whenever the legislature shall prohibit contracts of a certain kind, it will never be without an excuse for prescribing that for making such a contract, one man shall be punished in one way and another man in another way.

Nor can it be said that this legislation comes within the power of the legislature to regulate the business of banking. The lending of money is not, like the receipt of deposits, or the issue of circulating notes, a business peculiar to banks; but is a thing which every man may do, if he will. Nor did the legislature in this enactment attempt any such regulation. It prescribed the same rate of interest for banks that it prescribed in the General Business Law for others, and by necessary implication forbade banks and bankers to take a higher rate. They are not permitted to do what is forbidden

to others; the prohibition is the same as to all; and a contract by a bank or banker for a higher rate is just as much a violation of the law as a similar contract made by anyone else. It is in *the punishment of the offense that the difference exists.* If the contract before the court had been made by a private banker, then, assuming it to be usurious, why should he have pleaded that he was a banker? Not to show that he was authorized to make the contract, but to show that the penalty for his violation of the law should not be a forfeiture of the principal, but a forfeiture of the interest alone. He would plead that fact, not to justify his act, but to mitigate the punishment. But the Constitutional mandate that "no state shall deny to any person within its jurisdiction the equal protection of the laws" requires that no different or higher punishment shall be imposed upon one than such as is prescribed for all for a like offence. (*Barber* v. *Connolly*, 113 U. S. 27, 31; *Yich Yo.* v. *Hopkins*, 118 U. S. 356, 367.)

Nor can it be said that the discrimination is slight or unimportant. The number of State banks, trust companies, savings banks and individual and private bankers in the State of New York will run into the hundreds, and the total amount of their loans probably exceeds the aggregate of the loans made by all the persons and corporations who are liable to the greater penalty. In fact, it is mainly upon those doing business in a small way that the heavier punishment is visited, while the lighter penalty falls upon those doing "big business."

In addition to the discrimination against the appellee in the matter of the penalty, he is fur-

ther denied the equal protection of the laws, in that his contract (if usurious) is condemned as illegal, while other contracts, equally within any mischief which usury laws are intended to prevent, are declared to be valid and enforcible. While his contract for advances upon the security of assigned accounts may be declared void, because the rate of interest was more than six per cent, yet the legislature has expressly enacted that upon demand loans of five thousand dollars or more any rate of interest may be agreed on, if the security given consists of warehouse receipts, bills of lading, certificates of stock, certificates of deposit, bills of exchange, or bonds or other negotiable instruments.

Now, it is conceded for the purposes of argument, that the legislature may classify loans, and upon some loans may forbid more than six per cent interest to be charged, without limiting the rate upon other loans. For example, the legislature might, for the protection of necessitous persons, limit the rate of interest where an assignment of salary or a mortgage upon household chattels is taken as security, though the parties to loans of another character might be allowed to agree on any rate. For suuch a classification there would be some reasonable basis. But what basis is there for distinguishing between an advance of ten thousand dollars upon the security of open accounts, and an advance of a like sum secured by a pledge of bills of exchange or promissory notes? In either case, the security consists of choses in action owned by the borrower—indebtedness due to him from third persons—and whether that indebtedness is represented by book accounts or by negotiable instruments, is a mat-

ter of form rather than of substance. If, in the present case, the bankrupt had gone through the form of drawing drafts upon his debtors, and had then turned over these drafts as collateral security, instead of assigning the accounts, the contract would have been perfectly valid, no matter what interest was charged. So, if he had taken notes from these debtors, and had transferred the notes. The intention was to pledge the amounts to become due to the bankrupt, and how could it be important—in view of any policy involved in the usury law—that that indebtedness was in the form of open accounts payable in ninety days, rather than in the form of promissory notes payable in that time? The distinction between the two cases is unsubstantial, and the discrimination against loans made upon the security of assigned accounts is merely arbitrary. But as said in *Gulf, Colorado & Santa Fe Ry.* v. *Ellis* (165 U. S., 155, 165-166), "the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth amendment, and in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection." (See also *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558-563; *Cotting* v. *Kansas City Stock Yard Co.*, 183 U. S. 79; *People* v. *Orange County Road Cons. Co.*, 175 N. Y. 85, 89; *People* v. *Duryea*, 198 N. Y., 1, 11.)

IX.

The decree of the Circuit Court of Appeals should be affirmed.

JOHN J. CRAWFORD,
Counsel for Appellee.

Supreme Court of the United States

OCTOBER TERM, 1912,
No. 591.

CLARENCE S. HOUGHTON, as Receiver in Bankruptcy of the Assets and Effects of Abram L. Canfield, Bankrupt,
Appellant,

against

WILLIAM H. BURDEN,
Appellee.

Motion to Affirm and Notice.

Appeal from the United States Circuit Court of Appeals for the Second Circuit.

SUPREME COURT OF THE UNITED STATES.

CLARENCE S. HOUGHTON, as Receiver in Bankruptcy of the Assets and Effects of Abram L. Canfield, Bankrupt,
Appellant,

vs.

WILLIAM H. BURDEN,
Appellee.

Oct. term, 1912.
No. 591.

Comes the appellee in this cause and moves the honorable court to affirm the decree herein, it being manifest that the questions on which the decision of the cause depend are so frivolous as not to need further argument, or if the court shall be of opinion that there is any question which needs to be argued, then to place the cause upon the summary docket.

JOHN J. CRAWFORD,
Counsel for Appellee,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

SUPREME COURT OF THE UNITED STATES.

CLARENCE S. HOUGHTON, as Receiver in Bankruptcy of the Assets and Effects of Abram L. Canfield, Bankrupt,
Appellant,

vs.

WILLIAM H. BURDEN,
Appellee.

Oct. term, 1912.
No. 591.

PLEASE TAKE NOTICE that the undersigned will move this Court at a term thereof to be held at the Court Room in the City of Washington, District of Columbia, on the 16th day of December, 1912, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to affirm upon the ground that the appeal is frivolous, or in the alternative, for an order placing the case upon the summary docket.

Dated, New York, November 25th, 1912.

JOHN J. CRAWFORD,
Counsel for Appellee,
No. 30 Broad Street,
Borough of Manhattan,
New York City.

To JACOB J. LAZAROE, ESQ.,
Counsel for Appellant.

Due and timely service of the above notice of motion and of a copy of the annexed brief is admitted this 25th day of November, 1912.

JACOB JNO. LAZAROE,
Counsel for Appellant.

Supreme Court of the United States.

CLARENCE S. HOUGHTON, AS RECEIVER IN BANKRUPTCY OF THE ASSETS AND EFFECTS OF ABRAM L. CANFIELD, BANKRUPT,
Appellant,

vs.

WILLIAM H. BURDEN,
Appellee.

October Term, 1912.
No. 591.

BRIEF FOR APPELLEE.

Statement.

This is a motion under paragraph five of Rule Six to affirm upon the ground that the appeal is frivolous. The appeal is by a Receiver in Bankruptcy from an order of the Circuit Court of Appeals for the Second Circuit, reversing an order of the District Court for the Southern District of New York. The proceeding is of the sort commonly called a reclamation proceeding, and was instituted by William H. Burden, the appellee here, and appellant below, to procure an order directing the receiver of Abram L. Canfield, a bankrupt, to pay over certain moneys collected by the receiver on accounts which the bankrupt had as-

signed to the appellee. The matter was referred to a Special Master who reported that the accounts were assigned in pursuance of an agreement which was wholly void for usury, and that they were the property of the bankrupt's estate; and this report was confirmed by the District Court. The order of confirmation was reversed by the Circuit Court of Appeals. The order of reversal does not show whether the reversal was upon the law, or upon the facts, or upon both (Record, p. 169).

The record discloses the following state of facts: At the hearing the appellee put in evidence a contract by which he agreed to make certain advances upon accounts to be assigned by the bankrupt. The debtors were not to be notified, but the bankrupt was to act as agent of the appellee in making the collections, and for the protection of the appellee, the bankrupt gave a bond made by the Fidelity and Casualty Company of New York, conditioned to indemnify the appellee (1) if any of the assigned accounts should be fictitious, or (2) if the bankrupt should fail to pay over any part of the collection.

By the express terms of the bond, the contract between the bankrupt and the appellee was made a part thereof, and it was expressly stipulated, as a condition of the liability of the Surety Company (1) that the appellee should enforce all the provisions of his contract with the bankrupt; (2) that the appellee should require the bankrupt to state in writing at the time of assigning each account the date when the payment of such account would be due; (3) that if the payment of any account should not be made within twenty days after such date, the appellee should there-

upon immediately make demand upon the debtor by registered mail; (4) that the appellee should require the bankrupt to file with him in connection with each account, a certificate signed by a responsible employee stating that the account referred to in the certificate represented a *bona fide* sale, and that the merchandise had been shipped to the customer; (5) that the appellee should at least monthly make an examination of the accounts of the bankrupt which should embrace (a) a complete examination of the books, accounts, and vouchers of the bankrupt respecting the accounts assigned, and (b) a strict comparison between all unpaid accounts as such accounts should appear on the records of the appellee and as they should appear in the books of original entry of the bankrupt.

For the time and labor which would be required in the performance of these stipulations, the parties agreed in their contract that the appellee should be compensated. The terms of the agreement on that head were these:

> "VII. The party of the second part shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him in making the examinations required by the terms of the bond executed by the Fidelity and Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing one per cent per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that the same shall remain so uncollected" (fol. 30).

Upon the hearing the bankrupt, who was called as a witness on behalf of the Receiver, was ex-

amined by counsel for the Receiver concerning certain conversations which the bankrupt stated took place between him and the appellee at the time of the execution of the written contract, and over the objection of the appellee that all the negotiations of the parties were merged in the writing, and that the writing spoke for itself, this witness was allowed to testify that when the written agreement was submitted to him by the appellee, he asked the appellee what was meant by the clause in reference to services, and that the latter replied, "that was simply to get around the usury law" (fols. 257-258, 266-269). One of the subscribing witnesses—Miss Hess, who afterwards became Mrs. Herzog—was then called as a witness on behalf of the receiver, and over like objection and exception, was allowed to testify to conversations between the bankrupt and the appellee held before the agreement was signed, and among other things was permitted to testify that she heard the appellee say that the one per cent was "to cover the bonus and usury charge" (fols. 279-280, 282-286). The appellee was then called in his own behalf, and denied that any such conversations occurred (fols. 363-366), and in this he was corroborated by a man named Kohler, the other subscribing witness to the agreement (fols. 317-322). The Special Master credited the story told by the witnesses for the Receiver, and upon that testimony found that the contract was usurious and void.

ARGUMENT.

I.

No error is assigned which this Court need notice, since there is no assignment which is not insufficient, either because it refers merely to what was said in the opinion, or is too general and indefinite to meet the requirements of the rule.

An examination of the twenty assignments of error filed by the appellant (Record, pp. 171-173) will disclose that all except the fifteenth and twentieth—which are insufficient for other reasons—are aimed at nothing except statements and arguments found in the opinion. But this court has repeatedly held that the opinion is no part of the record. In *England* v. *Gebhardt* (112 U. S., 502) the court said: "Neither is the opinion of the court a part of the record. Our Rule 8, Sec. 2, requires a copy of any opinion that is filed in a case to be annexed to and transmitted with the record, on a writ of error or an appeal to this court, but that of itself does not make it a part of the record below." (See also Williams *v.* Norris, 12 Wheat, 117; Saltonstall *v.* Birtwell, 150 U. S. 417, 419; Stone *v.* United States, 164 U. S. 380, 382.)

The only exception made to this rule is that, in proper cases, the court has examined the opinion to ascertain whether a Federal question was involved. (Murdock *v.* City of Memphis, 20 Wall. 590, 633; McManus *v.* O'Sullivan, 91 U. S., 578; Gross *v.* United States Mortgage Co., 108

U. S., 477.) The reason for the exception is obvious. In some cases it would be impracticable to have the record show that a right or immunity under the constitution or laws of the United States was claimed, and this can be made to appear only by evidence outside of the record; and from the necessity of the case, the court looks to the opinion, just as it sometimes receives a certificate from the State Court that a Federal question was raised and decided. (See Murdock *v.* City of Memphis, 20 Wall., 590, 633.)

But while this exception to the practice which prevails in other courts has been allowed from necessity, the court has never permitted the opinion to be used for the purpose of assigning such errors as ordinarily occur; and obviously such a departure from the usual and orderly course of procedure would produce only uncertainty and confusion. In Illinois, where the Appellate Courts—which are intermediate courts of appeal corresponding to the Circuit Courts of Appeal in the Federal system—are required by statute to briefly state in writing the reasons for their decisions, the Supreme Court of the State has said: "To say that error can be assigned upon that writing seems little less than absurd. Those courts are required to pass upon questions of fact, but they are not required to state in their opinions that such duty has been performed, nor by what process of reasoning they reach their conclusions. * * * What the court below may have assigned as reasons for its decision can in no way affect the correctness of the judgment, however instructive it may be in ascertaining the points upon which the case was considered and decided in that court." (Pennsylvania Company *v.*

Verstein, 140 Ill., 637, 640; 15 L. R. A. 798.) So, in a recent case the Court of Appeals of New York said: "While we require the opinions written to be printed and made a part of the record, they do not form a part of the judgment roll. We do not, therefore, look to the opinions for the purpose of determining the contents of an order, finding, or judgment, or its meaning. We only examine the opinions for the purpose of ascertaining the arguments made and the reasons given in support of the rulings and determinations made by the court whose order or judgment is under review" (Morehouse *v.* Brooklyn Heights R. R. Co., 185 N. Y. 520, 526).

This practice of the highest courts of Illinois and New York does not rest upon any thing peculiar to the procedure in those states, but upon considerations equally applicable to any other appellate court. Indeed, it only conforms to what was said by Chief Justice Marshall in Williams *v.* Norris (12 Wheat. 117, 119-120), viz.: "It [the opinion] can be introduced for no other purpose than to suggest to the superior court those arguments which might otherwise escape its notice, which operated in producing the judgment." It is quite true that in subsequent cases this court has not adhered strictly to the views expressed in Williams *v.* Norris. But certainly, there can be no reason for departing from them so far as to allow the use of the opinion for the purpose of showing whether the reversal was upon the law or the facts, when that matter may be so easily made to appear by the order or judgment itself.

If any proof were required of the unsuitableness of the opinion as a support for the assign-

ment of errors, we have to look no further than the assignments filed in this case. The sixth, seventh, eighth and ninth go only to "the process of reasoning" employed by the Circuit Court of Appeals (see Randall *v.* N. Y. Elevated R. R. Co., 149 N. Y., 211, 213) and though they might be perfectly good, the decision of the court might still be correct.

In *Loeb* v. *Columbia Township Trustees* (179 U. S., 472, 485) this court, after deciding that the opinion of the Circuit Court "may be examined in order to ascertain whether either party claimed that a state statute upon which the judgment necessarily depended, in whole or in part, was in contravention of the Constitution of the United States," was careful to add: "*By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or by an agreed statement of facts, or by the pleadings.*"

Now, certainly in the present case, it would have been quite feasible to have had the record show the points decided by the Circuit Court of Appeals. Indeed, the appellant had only to follow the state practice, and have inserted in the order of reversal a recital showing whether the reversal was upon the law, or upon the facts, or upon both. (Van Tassell *v.* Wood, 76 N. Y., 614; Townsend *v.* Bell, 167 N. Y., 462, 467-469.) Then he would have had something against which he could properly direct his assignments of error. But as he has not caused it to appear by the order of reversal, or otherwise in the record, that the Circuit Court of Appeals passed upon the weight

or preponderance of the evidence, he is in no position to allege that the court committed any error in that regard. Hence, the eighteen assignments of error which have reference to those questions need not be noticed by this court.

As to the other two assignments of error, the fifteenth and the twentieth, while they refer to the record, they certainly do not set out with "particularity" the error asserted. To say that the Circuit Court of Appeals erred in reversing the order of the District Court, and in not affirming that order, points to no contention which the court might not infer from the mere fact that the appeal was taken. And as the order of the Circuit Court of Appeals does not show whether the reversal was upon the facts or upon the law, the court could discover the alleged error only by reading the entire record, and examining all the evidence and all the rulings. A plainer case of a failure to comply with the rule could hardly be imagined. In this respect, the case is like Fidelity & Deposit Co. *v.* Anderson (102 Ga., 551). There the cause involved questions both of law and fact, and was tried before the court without a jury. The assignment of error was a general one, not specifying how or wherein the trial judge erred in his judgment, whether as to matter of law or as to matter of fact. It was held that the assignment of error was too general to be considered, and the writ or error was dismissed. (See also Lytle *v.* Prescott, 57 Minn. 129.)

In Deitsch *v.* Wiggin (15 Wall. 239, 246), the Court said:

> "That rule [No. 35] is necessary to the disposition of the business which presses upon

> us, and it is our intention hereafter to enforce strict compliance with its demands. If errors are not assigned in the manner required, the assignments will be treated as if not made at all."

Now, certainly, these observations are quite as pertinent now as then, especially when the appellant would impose upon the court a duty which the highest appellate court should never be required to perform. (See Montgomerie *v.* Wallace, L. R. A. C. (1904) 73, 83, per Lord Davey). And while this court may sometimes notice a plain error of *law* not assigned, there can be no good reason why it should read through all the evidence, unless the question of the weight of evidence is raised by an assignment of error which strictly complies with the rule.

II.

In a proceeding of this sort, where the equity practice is adopted only by analogy, this Court should not notice assignments of error which refer only to the weight of evidence, especially when, as in the present instance, the record discloses no claim or defense in equity.

The errors assigned by the appellant have reference only to the weight of evidence. (Record, pp. 170-172.) Now, if this were a "proceeding in

bankruptcy" such an assignment of errors would present no question for this court to review, since, in a proceeding of that character, the decision of the Circuit Court of Appeals upon the facts is conclusive. (General Order XXXVI) But is there any reason why a different practice should prevail merely because the appeal is in "a controversy arising in bankruptcy proceedings"? The answer to this would seem to depend upon whether or not such appeals are to be treated *in all respects* as if they were appeals in equity.

When we look at the record in this case we see that it presents no question of equitable jurisdiction. The receiver has set up no right which, if asserted in a plenary suit, would be cognizable on the equity side of the court. His claim is that the contract was usurious—a contention he could make in any court of law. Upon what ground, then, can this court be asked to examine the facts? Certainly not because the proceeding is a suit in equity, but merely because the appeal is from a decision of the Circuit Court of Appeals in a proceeding which originated in a court of bankruptcy.

In addition to the fact that the proceeding pertains to no matter of equitable right, we are to note that it would not even be within the jurisdiction of the Federal courts, except for the casual circumstance that one of the parties happens to be a receiver in bankruptcy. The parties are not, so far as the record shows, citizens of different states; nor is the construction of any Federal statute involved, but merely the application of a statute of New York. The matter then comes to this, that in a proceeding concerning only *legal* rights, where a state statute is to be applied, and

no right or immunity under the constitution or laws of the United States is claimed, and where the Federal jurisdiction is entirely accidental, this court is asked to perform the most ordinary function of a common jury, namely, to decide a question of veracity between witnesses.

That such a duty should be imposed upon the court even where the amount involved is ten thousand dollars, seems quite preposterous. But with this case as a precedent, where would the matter end? Receivers and trustees in bankruptcy have many controversies with third persons respecting the title to property claimed to be a part of the bankrupt's estate, and in most of these the issue of fact is as sharply contested as in the present case. Now, shall this court have to decide such an issue whenever either party sees fit to bring it here? When we recall that the jurisdictional amount is only one thousand dollars, we can easily see what consequences must follow. Trivial disputes, involving only questions of veracity between witnesses, would clog the docket, and seriously impede the proper business of the court. Certainly a practice which would result in such public inconvenience ought not to be adopted, except for reasons that are imperative.

The appellee does not mean to contend that the court is without power to pass upon the facts; for he must concede that the case is properly brought here by an appeal (Hewett *v.* Berlin Machine Works, 194 U. S. 296). But *must* the court exercise that power, when the record discloses that the case involves no equitable principles and could not have originated in a court of equity? Does the mere fact that the mode of procedure is an ap-

peal, and not a writ of error require the court to treat the case as it would a suit for specific performance or for a permanent injunction, or for other equitable relief? Unless the court is to be bound by what is at most a mere matter of form, it must have the right to look into the nature of the case, and to conform the practice to what is befitting the character of the controversy, preserving the fundamental distinction between the procedure which is proper in cases involving equitable rights, and that which is appropriate when only legal rights are to be determined. When we look at the present record we find no question raised which could not be decided in a court of law, and the case to which it bears the nearest resemblance is an action at law tried before the court without a jury. Why, then, does not the former practice of this court upon appeals in that class of cases furnish the true analogy? (Rev. Stat. U. S. 700. Dirst *v.* Morris, 14 Wall. 484; Capelin *v.* Insurance Co., 9 Wall. 461; United States *v.* Dawson, 101 U. S. 549). Why must the equity practice be adopted when the equity jurisdiction is not invoked? Certainly, if there ever was a case where regard is to be had to substance rather than to form this is such a case. For what could be more absurd than that suitors who have questions of greatest moment to submit to the court, should have to wait while the court stops to decide the trifling question: Whose witnesses told the truth concerning the oral declaration of a party as to the meaning of a written contract he was about to execute?

As we have seen, the Federal jurisdiction in this case depends wholly upon the fact that one of the parties is a receiver in bankruptcy. The Bankruptcy act then, is the only source of jurisdiction.

Now, that act contains this provision: "All necessary rules, forms and orders as to procedure * * * * * and for carrying this act into effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States." (Sec. 30). In pursuance of the power so conferred this court has promulgated a rule that in bankruptcy proceeding the court from which the appeal is taken must make findings of fact, which are conclusive here. (Rule XXXVI). While this rule applies only to "proceedings in bankruptcy" the power of the court to regulate the mode of procedure is not limited to that particular class of proceedings. The words of the statute are "All necessary rules * * * as to procedure." This language is general and comprehensive, and fairly embraces the procedure applicable to any proceeding which originates in a court of bankruptcy. Nor is it important that the court has not yet adopted a rule by which the findings of the Circuit Court of Appeals are made conclusive in a "controversy arising in bankruptcy proceedings"; for as the court has power to prescribe *all* rules of procedure, it is not material whether the power is exercised by promulgating formal rules or by making rulings from time to time as occasion may require. And while this case is not controlled by rule XXXVI, that rule affords a just *analogy* when the court is asked to review the facts.

No doubt, all proceedings in a bankruptcy court are, as said in *Bardes v. Howarden Bank* (178 U. S. 533) "in the nature of proceedings in equity." But obviously this means no more than that there is an *analogy* between the two; for bankruptcy is a separate head of jurisprudence

just as admiralty is. The courts of bankruptcy are vested with jurisdiction "*at law and in equity*", (Bankruptcy Act, Sec. 8) and they apply the rules of law or the rules of equity as the nature of the case may require. Indeed, the record now before the court furnishes an illustration of a proceeding in which no question of equity jurisprudence has arisen. The practice is *assimilated* to that in equity, but it is not the same thing; and as in other cases where the practice in one court is conformed to that of another, conformity should be carried no further than convenience and expediency require.

A circumstance which makes an appeal upon the facts seem especially out of keeping in the present case is that the case comes up from a court sitting in a state where the highest court is relieved from the duty of reviewing facts. (New York Code of Civil Procedure, § 191.) True, the practice in the New York Court of Appeals is not a guide for this court; but it tends to emphasize the unreasonableness of this appeal. For certainly the same considerations which have made it necessary to relieve that court from the duty of deciding questions of fact apply with greater force to this court. In England the Court of Appeal will not allow an appeal to the House of Lords in a bankruptcy case upon a question of fact. (*Ex parte Miles*, L. R. 2 Q. B. Div. 39, 47; *In re Lake*, K. B. Div. [1901] 710, 719; *Ex parte Hayman*, L. R. 8 Ch. Div. 11, 26), and for the same reasons this court should refuse in that class of cases to notice assignments of error which refer only to the weight of evidence.

III.

If the statement in the opinion of the Circuit Court of Appeals that the burden of proof was strongly on the trustee is to be regarded as a ruling on a question of law no argument is required to establish its correctness.

In the assignment of errors filed in this Court by the appellant, it is assigned for error that the Circuit Court of Appeals determined "that the taking of usury being a crime, the burden was strongly upon the trustee to prove his contention in that regard." (Record, p. 172). This refers to a statement made in the course of the opinion. (Record, p. 167). Now, even if this could be regarded as a ruling upon a question of law, it is so obviously correct that no argument upon the subject would be useful. For the court was speaking with reference to a statute of New York, and the highest court of that State has repeatedly declared this to be the rule. In *White v. Benjamin,* (138 N. Y. 623, 624), that Court said: "Usury is a crime, and he who alleges it as a defense to an obligation to pay money must establish it by clear and satisfactory evidence. He enters upon the defense with the presumption against the violation of the law, and in favor of the innocence of the party charged with the usury. He cannot properly claim to have the usury inferred where the evidence is inconclusive and just as consistent with the absence as with the presence of usury. It is a just requirement that all the facts constituting the usury should be proved *with rea-*

sonable certainty, and that they shall not be established by mere surmise and conjecture, or by inference entirely uncertain."

See also

Stillman *v.* Northrup, 109 N. Y. 473, 478.
Rosenstein *v.* Fox, 150 N. Y. 354.

IV.

The decree of the Circuit Court of Appeals should be affirmed, or if the Court shall consider that there is any question to be argued, the case should be placed on the summary docket.

JOHN J. CRAWFORD,
Counsel for Appellee.

Supreme Court of the United States.

CLARENCE S. HOUGHTON, as Receiver in Bankruptcy of the assets and effects of Abram L. Canfield, Bankrupt, Appellant, *against* WILLIAM BURDEN, Appellee.	October Term, 1912. No. 591.

BRIEF FOR APPELLANT.

Statement.

The statement contained in appellee's brief is substantially correct. It may however be added that this proceeding comes before this Court on an appeal from an order of the Circuit Court of Appeals for the Second Circuit, reversing the order of the District Court of the United States for the Southern District of New York which latter Court affirmed the order of the Special Master.

The Special Master sustained the appellant on the law and on the facts. The District Court affirmed the order of the Special Master on law and on the facts.

The Circuit Court sustained the Special Master and District Court on law but reversed the order of the District Court on the facts.

ARGUMENT.

Answer to No. I.

The assignments of error are proper and are sufficient in form and substance.

This motion is made by the appellee under Paragraph 5 of rule 6 to affirm upon the ground that the appeal is frivolous.

It is elemental that that which is frivolous must appear so from an inspection or should be self evident and it is also elemental that that which is self evident requires neither proof nor argument.

In spite of this elemental proposition, the appellee has devoted a brief of seventeen pages in argument in an endeavor to demonstrate that the appeal is frivolous.

This in itself would almost suffice as an answer to appellee's contention.

As we understand it, the appellee advances as his first proposition that the assignments of error are insufficient either because they refer to what was said in the opinion or because they are too general or indefinite to meet the requirements of the rule.

It is not disputed as a matter of practice that the opinion is not a part of the record but that the same is incorporated therein because of the rule of this Court requiring that a copy of any opinion filed in the case be annexed to and transmitted with the record.

The practice followed on this appeal by appellant is that which has been followed in numerous

cases passed upon by this Court, Hewitt *v.* Berlin Machine Co., 194 U. S., 300. *In re* Moore and Bridgman, 106 Fed., 689. Moorehouse *v.* Pacific Hardware, etc., Co., 24 Am. B. R., 178.

In the case at bar the matter in controversy being a controversy in a proceeding in bankruptcy, was heard by the Special Master after a full and complete trial of the matters involved. The Special Master made and filed his findings (Rec., pages 14-43). On the findings thus made and filed by the Special Master a motion was made in the United States District Court in the Southern District of New York, to affirm the report and findings of the Special Master and such proceedings were had that the findings were affirmed and an order to that effect entered (Rec., page 152).

From that order as entered, an appeal was taken to the Circuit Court of Appeals for the Second Circuit, the order of the District Court reversed and the order reversing the findings of the District Court which virtually reversed the findings of the Special Master was made by the Circuit Court of Appeals.

A reading of the opinion of the Circuit Court of Appeals (which opinion we deem is properly inserted in the record as guide to the Appellate Court for the determination of the lines of the decision of the Circuit Court), is essential. On examination of this record we disclose the findings of the Special Master and the order of the District Court are affirmed and sustained on the law and reversed on the findings of fact.

It has been the invariable practise of the Circuit Court of Appeals not to interfere with the findings of fact by the District Judge or by a Referee affirmed by the District Judge unless the

findings are clearly erroneous or as it is at times expressed "manifestly against the weight of evidence." *In re* Noyes, 127 Fed., 286. Burleigh *v.* Forman, 139 Fed., 13. Barton Bros. *v.* Texas Produce Co., 136 Fed., 355. *In re* Cole, 144 Fed., 392; *In re* Lawrence, 134 Fed., 843.

This has been the practise of the Court pursuant to numerous decisions upon the ground that "when the Court has considered conflicting evidence and made the findings or decree, it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the findings or decree must be permitted to stand." Coder *v.* Arts, 152 Fed., 243-213 U. S., 223; Merchants' Bank *v.* Cole, 149 Fed., 708.

The appellant in this case in view of the foregoing, feeling himself aggrieved appeals to this Court upon assignments of error appearing in the record on page 170; an examination of these findings will disclose that they are not frivolous, but are, in the opinion of the appellant, based upon serious errors of the learned Circuit Court in reversing the findings of fact of the Special Master which findings were made and filed after consideration of conflicting evidence and the findings should be considered presumptively correct unless as heretofore quoted some obvious error of law has intervened or some serious mistake of fact has been made.

The opinion of the Circuit Court of Appeals therefore becomes a necessary part of the record to determine the basis of reasoning; a reading of that opinion will disclose that the Circuit Court of Appeals affirms every proposition of law found by the Special Master and by the District Court;

it reverses the Special Master and District Court on the findings that they arrived at after considerable conflicting evidence.

The question then arises, was there a serious mistake of fact made by the Special Master and by the District Court in the findings of fact.

The twenty assignments of error upon which this appeal was allowed by the Circuit Court to this Court are based upon the error committed by the Circuit Court in reversing the findings of the Special Master that had been affirmed by the District Court.

The appellant finds fault with the form and sufficiency of these assignments of error upon the ground that they refer merely to what was said in the opinion.

Our contention is, that these assignments of error are in proper form and are specific enough to bring up this entire case for review before this Court.

If we select any one of these findings as for example the first, second and third assignments of error it would be found that each one of them as well as the others that follow are based upon the findings of the Special Master, the order of confirmation of the District Court and the order of the reversal of the Circuit Court, all of which are essential parts of the record.

The appellee also urges that the fifteenth and twentieth assignments are too general or indefinite. It is our contention that the fifteenth assignment of error alone would be sufficient to bring up before this Court the entire question on appeal. In Doan *v.* Amer. Book Co., 105 Fed., R. E. B., 772, it was held that an assignment of error in a suit for injunction was proper in form when the error

complained of was "that the Court erred in granting the injunction." If we disregard all other assignments of error we believe that the fifteenth is in itself sufficient and proper upon which this appeal could be heard by this Court.

Answer to Argument No. II.

The appellee has in his argument No. II devoted considerable space to the contention that this Court is without power to hear this appeal.

On page 12 of appellee's brief last paragraph the appellee abandons his contention by saying that he does not mean to contend that the Court is without power to pass upon the facts and concedes that the case is properly brought here by appeal.

The appellee complains that this Court should not exercise power to hear this appeal because the record does not disclose equitable principles and that the case itself could not have originated in a court of equity.

Under Sections 24 and 25 of the Bankruptcy Act special provision is made for an appeal to the United States Supreme Court in cases of this character. The mere fact that there are no equitable principles involved is of no moment.

The practice with respect to appeals in cases of this character is the same as in equity. That is merely the rule of this Court governing the practice in appeals of this character.

This case involves what is termed "a controversy arising in bankruptcy proceedings." This Court has frequently defined and distinguished what is meant by proceedings in bankruptcy and controversies arising in bankruptcy proceedings.

By the latter is meant those independent suits which concern the bankrupts' estate and arise by intervention or otherwise between the trustee representing the bankrupts' estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors.

In re Muller, 135 Fed., 711.
In re Farrell, 176 Fed., 505.

In the case at bar Burden, the claimant, contended that he was entitled to certain outstanding accounts which the Receiver in Bankruptcy claimed belonged to the bankrupts' estate. To substantiate his right Burden, the claimant, intervened in the bankruptcy proceedings to establish that right, thus creating a controversy arising in bankruptcy proceedings. The only method prescribed in the Bankruptcy Act for the Appellate Court to review the controversy of that character is by appeal as distinguished from a petition to review.

Petitions to review or to revise bring up only questions of law, but appeals, both law and facts.

Elliot *v.* Toeppner, 187 U. S., 327.

Said the Court in the last mentioned case:

"The distinction between a writ of error which brings up matters of the law only and an appeal which unless expressly restricted brings up both law and fact, has been observed by this Court and been recognized by the Legislation of Congress from the foundation of the government."

In re Blanchard Shingle Co., 164 Fed., 311.

The appellee in his brief urges that this Court should not be burdened with an examination of the

facts, for that would necessitate reading of the entire record.

The Circuit Court of Appeals, in reversing the findings of the Special Master and the order of the District Court, could only have done so under the authorities cited in the event of "obvious error of law or serious mistake of fact." To determine the controversies of this ruling, the record must be examined.

The motion to affirm should be denied.

Respectfully submitted,

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Counsel for Appellant.

[1918]